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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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CASES REPORTED IN VOLUME V.

Adair v. Brimmer, 683.
Ahren v. Dubuque M. Co. 144.
Alexander v. Cauldwell, 650.

Bagnall v. L. & N. W. R'y Co. 362, 366.
Bell v. Brown, 240.
Belle Green M. Co. v. Tuggle, 464.
Big Mountain Improvement Co.'s Appeal, 178.
Billings v. Taylor, 65.
Bragg v. Geddes, 624.
Broder v. Natoma Water Co., 33.
Brown v. Corey, 368.
Bullion M. Co. v. Crœsus M. Co. 254.
Burke v. Flood, 469.
Burke v. Table Mountain Water Co. 209.
Busenius v. Coffee, 214.

Cahill v. Bennett, 664.
Carnahan v. Brown, 193.
Clegg v. Dearden, 88.
Clement v. Youngman, 230.
Cleveland & P. R.R. v. Ball, 333.
Coates v. Cheever, 55.
Colman v. Clements, 247.
Comyn v. Kyneto, 198.
Comyn v. Wheatley, 198.
Consolidated Co. v. Cent. Pac. R. R. Co. 438.
Coryell v. Cain, 226.

Dannmeyer v. Coleman, 474.
Dayton M. Co. v. Seawell, 424.
Depuy v. Williams, 251.
Draper v. Douglass, 601.

Eagan v. Delaney, 223.
Edgewood R. R. Co.'s Appeal, 406.
Esmond v. Chew, 175.
Evans v. Haefner, 344.

Fabian v. Collins, 20.
Felger v. Coward, 273.
Feversham v. Emerson, 500.
Fletcher v. Smith, 78.
Fogus v. Ward, 1.

Gooch v. Sullivan, 14.
Goodright v. Swymmer, 200.
Graves v. Poage, 670.
Green v. Prettyman, 515.
Grubb v. Guilford, 163.

Haldeman v. Bruckhart, 108.
Hansen v. Martin, 643.
Hebrard v. Jefferson Co. 270.
Hendrix v. McBeth, 74.
Henry v. Everts, 603.
Herbert v. King, 303.

Hinkle v. San Francisco & N. P. R. R. Co. 645.

Jackson v. Feather River Water Co. 594.
Jackson v. Olitz, 202.
Jenny Lind Co. v. Bower & Co. 589.
Jones v. Bolles, 444.

Karns v. Tanner, 289.
Kelly v. Taylor, 598.
King v. Randlett, 605.

Lenfers v. Henke, 67.
Locust Mt. Co. v. Gorrell, 129.
Lombardo v. Ferguson, 588.
Lyon v. Gormley, 383.

Mandlebaum v. North Am. M. Co. 506.
Marquart v. Bradford, 528.
Mercer M. & M. Co. v. McKee's Adm'r, 531.
Meyendorf v. Frohner, 559.
Murphy v. Cobb, 330.
McCormick v. Horan, 154.

New Boston Co. v. Pottsville Co. 118.

Osgood v. El Dorado Water & Deep Gravel Co. 37.
Outram v. Morewood, 484.

Patterson v. Hitchcock, 542.
Philadelphia Coal Co. v. Taylor, 133.
Pool v. Lewis, 523.
Powell v. Reese, 676.

Ralston v. Plowman1.60, .
Reamer v. Nesmith, 610.
Rees v. Jackson, 615.
Reynolds v. Hosmer, 6.
Rowe v. Bacigalluppi, 237.
Rynd v. Rynd Farm Oil Co. 275.

San Felipe M. Co. v. Belshaw. 315.
Schissler v. Chesshire, 309.
Searle v. Lackawanna & B. R. R. Co. 353.
Sears v. Taylor, 318.
Shay v. Tuolumne Co. 587.
Silver M. Co. v. Fall, 283.
Sloan v. Lawrence Furnace Co. 659.
Smith v. Doe, 218.
Smith v. Wilmington Coal Co. 679.
Stevens v. Williams, 449.
Stewart v. Munford, 555.
Stoughton v. Leigh, 47.
Stuart, Buchanan & Co. v. White, 454.

Titcomb v. Kirk, 10.
Troxell v. Lehigh Crane Iron Co. 517.

Union M. Co. v. Taylor, 323.

Valley City Salt Co. v. Brown, 397.

Ward and others' Appeal, 666
Waring v. Crow, 204.
Watts v. Tibbals, 662.
West Virginia Co. v. Volcanic Co. 389.
Whitaker v. Brown, 656.
Whittingham v. Andrews, 198.
Wickersham v. Chicago Zinc Co. 536.

TABLE OF CASES CITED IN VOLUME V.

THOSE CASES PRINTED IN ITALICS ARE TO BE FOUND REPORTED IN THE SERIES.

Abadie v. Carillo, 214.
Abney H. Ass'n v. Willard, 322.
Abinger v. Ashton, 655, 6 M. R. 1.
Ackerman v. *Hartley*, 454, 1 M. R. 74.
Acton v. Blundell, 112, 114, 116, 135, 197. WATER.
Adam v. Briggs Co., 72, 483. SEVERANCE.
Adlin v. Gove, 186.
Alexander v. Crosthwaite, 636.
Alexander v. Kerr, 186.
Allegheny Work House v. Moore, 654.
Allen's Estate, 185.
Armstrong v. Lower, 202, 543.
Armstrong v. Norton, 505.
Ashhurst's Appeal, 481.
Aslin v. Parkin, 484.
Atchison v. Peterson, 27, 36. 1 M. R. 583.
Atherton v. Fowler, 578.
Atkins v. Hendree, 240. 2 M.R.328.
Atlantic Co. v. Campbell, 337, 338.
Att'y Gen. v. Brittain, 123.
Att'y Gen. v. Cleaver, 124.
Att'y Gen. v. Utica Ins. Co., 124.
Audenried v. Phila. R. R. Co., 140.
Aurand v. Wilt, 185.

Babcock v. Utter, 29, 30.
Backenstoss v. Stahler, 385.
Baird v. Williamson, 82, 88, 136, 156, 159. 4 M. R. 368.
Baker's Appeal, 667.
Baltimore R. R. v. Hoge, 620.
Bank v. Rail Road Co., 186.
Bankhead v. Brown, 434.
Bannon v. Mitchell, 88. 2 M. R. 108.
Baptist Cong. v. Scannel, 140.
Barclay R. R. v. Ingham, 124.
Barkley v. Tieleke, 20, 27. 4 M. R. 666.
Barnes v. Sabron, 27, 37, 108. 4 M. R. 673.
Barstow v. Union Co., 328.
Basey v. Gallagher, 36. 1 M. R. 683.
Bassett v. Bennet, 491, 498.
Bassett v. Enwright, 214.
Bealey v. Shaw, 123.
Bear v. Whisler, 295.
Beatty v. Gregory, 332. LICENSE.
Beaufort v. Morris, 124, 136.
Beaupland v. McKeen, 187.
Beekman v. Saratoga R. R. Co., 400, 428, 429, 439.
Belcher Co. v. Deferrari, 247.
Belk v. Meagher, 655. 1 M. R. 510.
Bell v. Hull Railway, 124.
Bell v. Schultz, 655. TAILINGS.
Bellinger v. N. Y. C. R. R., 156.
Bellows v. Sackett, 156.

Bentz v. Armstrong, 136.
Benford v. Sanner, 620.
Biddle v. Ash, 124.
Biddle Boggs Co. v. Merced Co., 516, 562, 600. MEXICAN GRANT.
Billings v. Taylor, 77. 5 M. R. 65.
Bird v. Lisbros, 323.
Birmingham Co. v. Lloyd, 124. LACHES.
Bishop v. Georgeson, 641.
Bivins v. Harris, 669.
Black v. Hepburne, 186.
Bliss v. Greeley, 159.
Bliss v. Kingdom. 442. WAY.
Bloodgood v. Mohawk Co., 429.
Bloomfield Co. v. Richardson, 434.
Bodine v. Glading, 281.
Bonaparte v. Camden & Amboy R. R., 123.
Booth v. Oliver, 100. 103.
Booth v. Pollard, 483. SPECIFIC PERFORMANCE.
Booth v. Town of Woodbury, 439.
Bortz v. Bortz, 295.
Boston Corp. v. Newman, 429, 439.
Bourne v. Gatliffe, 614.
Boyce v. McCulloch, 187.
Boyd v. Blankman, 480.
Boyle v. Zachare, 453.
Bradley v. Grosh, 620.
Bradley v. Harkness, 45. PARTNER.
Bradley v. Lee, 332. 4 M. R. 470.
Brandt v. Wheaton, 218. 1 M. R. 145.
Brant v. Virginia Co., 30, 547.
Brewster v. Lathrop, 654. 2 M. R. 557.
Bridge v. Payson, 244.
Broadbent v. Ramsbotham, 156.
Broadhead v. Milwaukee, 439.
Broder v. Natoma Co., 37, 44, 197. 5 M. R. 33.
Broderick's Will, 480, 481.
Brown v. Bowen, 32.
Brown v. Caldwell, 168. REPLEVIN.
Brown v. Chadwick, 661.
Brown v. Corey, 333, 655. 5 M. R. 368.
Brown v. Hurd, 636.
Brown v. Illins, 116.
Brown v. Ryckman, 245.
Brown v. Whiteway, 707.
Buckeridge v. Ingram, 49.
Buffam v. Harris, 156.
Burdge v. Smith, 221. PUBLIC DOMAIN.
Burke v. Carruthers, 214.
Burke v. Flood, 469, 474, 481, 482. 5 M. R. 469.
Burnett v. Whitesides, 46. INJUNCTION.
Butler v. Wentworth, 244.
Butz v. Ihrie, 167.
Buxton v. N. E. R'y Co., 82.

Cady v. Shepherd, 139.
Caldwell v. Fulton, 135, 186, 195, 232, 281, 295, 373, 6 8. 3 M. R. 238.
Caldwell v. Knott, 124.
Caledonia Co. v. Lockhart, 367.
California Co. v. Redington, 669.
Cambria Co. v. Tomb, 299.
Cambridge Inst. v. Littlefield, 186.
Campbell v. Bear Co., 45. NEGLIGENCE.
Campbell v. Buckman, 31
Campbell v. Rankin, 484. POSSESSION.
Carey v. Bright, 534, 669.
Carlisle v. Cannon, 123.
Carnahan v. Brown, 331. 5 M. R. 193.
Carncross v. Lorimer, 186.
Carpenter v. Stilwell, 186.
Carpentier v. Oakland, 480.
Carr v. Carr, 71.
Carron Iron Co. v. McClarron, 186.
Caruthers v. Pemberton, 27. 4 M. R. 622.
Case v. Cushman, 534.
Castro v. Wetmore, 214.
Chadwick v. Coleman, 108. SURFACE SUPPORT.
Chadwick v. Trower, 134.
Chambers v. Furry, 385.
Chapman v. Chapman, 32.
Chase v. Miller, 123.

Chatfield v. Wilson, 112.
Chetham v. Williamson, 234, 236, 281. LICENSE.
Chicago Co. v. Northern Co., 158. WATER.
Chicago Co. v. Iowa, 148.
Chicago Co. v. U. S. Petroleum Co., 295. RECEIVER.
Clap v. Draper, 186, 195.
Clarehall v. Harding, 185.
Clark v. Clark, 704.
Clark v. Huber, 238.
Clavering v. Clavering, 49, 61, 66, 118. TENANT FOR LIFE.
Clayton v. Gregson, 592. LEVEL.
Clegg v. Dearden, 136. 5 M. R. 88.
Clegg v. Edmundson, 536. LACHES.
Clement v. Masser, 197.
Clement v. Youngman, 195, 196, 275, 281. 5 M. R. 230.
Clink v. Thurston, 500.
Clinton v. Myers, 156.
Coates v. Cheever, 66, 67, 69, 71, 77. 5 M. R. 55.
Cogswell v. Bull, 473.
Coldren v. Brownwelt, 295.
Cole v. Cheovenda, 209.
Cole v. White, 185.
Collins v. Case, 586. 1 M. R. 91.
Collins v. Torry, 62.
Colman v. Clements, 204, 270. 5 M. R. 247.
Columbia Co. v. Holter, 27, 45. 2 M. R. 14.
Com. v. Bank of Penna., 124, 192.
Com. v. Clark, 331.
Com. v. Lyons, 125.
Com. v. Moltz, 139.
Com. v. P. & C. R. R., 125.
Com. v. Snyder, 124.
Conant v. Smith, 72. PARTITION.
Conger v. Weaver, 45. 1 M. R. 594.
Conner v. Shepherd, 66.
Consolidated Co. v. Raber, 587, 650. 1 M. R. 405.
Consolidated Co. v. Cent. Pac. R. R. 46, 424. 5. M. R. 438.
Cook v. Holmes, 195.
Cooper's Appeal, 667.
Cooper v. Smith, 167.
Copper Hill Co. v. Spencer, 594. 3 M. R. 267.
Corning v. Troy Factory, 156.
Correa v. Frietas,46. 2 M. R. 336.
Corryell v. Cain, 318. 5 M. R. 226.
Covington v. Becker, 26.
Crane v. Brunnell, 186.
Crane v. Winsor, 45. NUISANCE.
Cravens v. Dewey, 306.
Crest v. Jack, 185.
Crisman v. Heiderer, 134.
Crittenton v. Alger, 197.
Crompton v. Lea, 82. 6 M. R. 179.
Crouch v. Puryear, 77. WASTE.
Crump v. U. S. Mining Co., 444. 3 M. R. 454.
Cumberland Co. v. Sherman, 694. 1 M. R. 322.
Cummings v. Peters, 443.
Cunningham v. Pell, 472.
Curtis v. Whipple, 440.

Dabsell v. Crawford, 185.
Daniels v. Lansdale, 42.
Dann v. Spurrier, 185.
Dannmeyer v. Coleman, 469. 5 M. R. 474.
Dark v. Hanks, 620.
Dark v. Johnston, 186, 195, 281, 303, 331. LICENSE.
Darlington's Appropriation, 186.
Darst v. Rush, 306.
Davis v. Bank of England, 513.
Davis v. Clark, 332.
Davis v. Davis, 30, 530, 531.
Davis v. Moss, 295.
Davis v. Perley, 530.
Deakers v. Temple, 620.
Deal v. Bogue, 667.
Deansville Cemetery, *In re*, 424.
De Costa v. Mass. Co., 46. MEASURE OF DAMAGE.
Deep River Co. v. Fox, 536. 1 M. R. 296.
De Ro v. Cordes, 215, 307.
Derry v. Ross, 46, 464, 483. 1 M. R. 1.

Des Moines v. Hall, 442.
Devoe v. Penrose Bridge, 125.
Dewey v. Bowman, 215.
Dickin v. Hamer, 71.
Dickinson v. Grand Junction Co., 114, 116.
Doe v. Bird, 296.
Doe v. Burt, 186.
Doe v. Meyrick, 5.
Doe v. Wood, 195, 234. LICENSE.
Doe v. Wright, 503.
Doll v. Good, 214.
Doner v. Stauffer, 667.
Donnell v. Humphreys, 45.
Doran v. Dinsmore, 244, 245.
Douglas v. Lock, 658.
Douglass v. Kindall, 281.
Douty v. Bird, 130. TRESPASS.
Dow v. Gould, etc., Co., 307.
Druse v. Wheeler, 550.
Dubuque v. Benson, 442.
Dubuque v. Stout, 148.
Duchess of Kingston's Case, 185, 503.
Dudley Co. v. Grazebrook, 333.
Duke of Beaufort v. Morris, 124, 136.
Duke of Beaufort v. Patrick, 187.
Dunning v. Rankin, 88. LOCATION.
Dutch Flat Co. v. Mooney, 251. 6 M. R. —.
Dyer v. Martin, 635.
Dyer v. Sanford, 187.

Eakman v. Sheaffer, 295.
Earl of Cardigan v. Armitage, 658.
Earl of Glasgow v. Alum Co., 135.
Earl of Ripon v. Hobart, 126, 124.
East Saginaw Co. v. East Saginaw, 144.
Eberly v. Groff, 185.
Ellis v. Duncan, 112, 116. WATER.
Ellison v. Jackson Co., 6. 4 M. R. 559.
Elmhirst v. Spencer, 124.
English v. Johnson, 202, 655. POSSESSION.
Enright v. San Francisco R. R. Co., 272.
Ernest v. Vivian, 483, 586. LACHES.
Ervin v. Collier, 31.
Esmond v. Chew, 160. 5 M. R. 175.
Eureka Co. v. Braidwood, 655. 4 M. R. 143.
Eureka Co. v. Richmond Co., 553. LODE.
Evans v. Bembridge, 186.
Evans v. Bicknell, 185.
Evans v. Haefner, 383. 5 M. R. 344.
Evelyn v. Haynes, 491, 499.

Fabian v. Collins, 14, 197, 205, 586. 5 M. R. 20.
Fancy v. Scott, 658, 659.
Farebrother v. Welchman, 186.
Farmers' & Mch. Bank v. Downey, 473.
Farmer's R. R. Co. v. Reno County, 140.
Feely v. Shirley, 46. PLEADING.
Felger v. Coward, 315. 5 M. R. 273.
Felton v. Justice, 24, 25.
Ferrer's Case, 491, 493, 495.
Fetter v. Beale, 102, 104.
Field v. Lelean, 654.
Field v. Seabury, 564.
Findlay v. Smith, 72, 77. SALINES.
Firmstone v. Wheeley, 98, 102, 103, 107. PLEADING.
Fish v. Redington, 214.
Fish v. Sawyer, 195.
Fisher v. Horicon Iron Co., 432.
Fishmongers' Co. v. East India Co., 124.
Fitch v. Archibald, 654. 2 M. R. 555.
Fitch v. Bunch, 214.
Flagg v. Eams, 4.
Flanagan v. City of Phila., 123.
Flemming v. Kerr, 195.
Fletcher v. Smith, 133. 5 M. R. 78.
Folk v. Beidelman, 187.
Foot v. Colvin, 167.
Foot v. Sprague, 186.
Foote v. Cunard Co., 474.
Forbes v. Gracey, 36. TAX.

Forsyth v. Day, 186.
Forsyth v. Oil Co., 296. OIL.
Forsyth v. Wells, 383, 385, 388. TROVER.
Foster v. Essex Bank, 308.
420 Mining Co. v. Bullion Co., 586. PATENT.
Fox v. Phelps, 195.
Fraley v. Peters, 483.
Frederick v. Gray, 195.
Freeman v. Cook, 512.
French v. Carhart, 661.
Fulton Bank v. N. Y. & S. C. Co., 540.
Funk v. Haldeman, 138, 186, 279, 281, 295. INCORPOREAL HEREDITAMENTS.

Gallagher v. Basey, 27, 28.
Garder v. Newburgh, 123, 124.
Gardner v. Clark, 244.
Garner v. Marshall, 214.
Garrison v. Sampson, 230.
Gartside v. Outley, 332. MORTGAGE.
Garrigues v. Harris, 620.
Gass v. Hampton, 506.
Gesner v. Cairns, 661.
Gesner v. Gas Co., 661.
Ghirardelli v. McDermot, 214.
Gibson v. Mason, 429.
Gi s n v. Tyson, 534. RESERVATION.
Giesy v. C. W. & Z. R. R., 341.
Gifford v. Carvill, 655. 6 M. R. —.
Gilbert v. Peru Iron Co., 609.
Gilchrist v. Rogers, 620.
Gilder v. Merwin, 124.
Gillespie v. Jones, 323.
Gillett v. Gaffney, 320.
Gillon v. Boddington, 101, 102.
Gilson Co. v. Gilson, 655.
Givens v. Wheeler, 254.
Glidden v. Strupler, 186, 187.
Gloniger v. Franklin Co., 195, 196. LICENSE.
Goddard v. Bulow, 592.
Golden Fleece Co. v. Cable Co., 226. 1 M. R. 120.
Golden Terra Co. v. Mahler, 21, 515. 4 M. R. 390.
Goldsmith v. Tunbridge Wells, 125.
Goller v. Fett, 274, 608. PARTIES.
Gomperts v. Pooley, 186.
Gooch v. Sullivan, 20, 178. 5 M. R. 14.
Goodspeed v. Wasatch Works, 655. PARTIES.
Gormley v. Sanford, 158. 197.
Grady v. Early, 3 1. PLEADING.
Grant v. Quick, 186.
Gratz v. Beates, 296.
Graver v. Scott, 654. 2 M. R. 644.
Graves v. Griffin, 298, 300.
Great Falls Co. v. Fernald, 483.
Green v. Ophir Co., 587. PLEADING.
Greenlee v. Greenlee, 185.
Greeves v. Gouge, 473.
Gregg v. Von Phul, 32.
Gregory v. Nelson, 46. PLEADING.
Griffith v. Cochran, 186.
Griffith v. Wright, 542.
Grove v. Hodges, 196. 2 M. R. 698,
Grubb v. Bayard, 195, 234, 281. LICENSE.
Grubb v. Guilford, 193. 5 M. R. 163.
Grum v. Seaton, 139.
Gunn v. Bates, 186.
Gunter v. Janes, 474.

Hagner v. Heyberger, 124.
Hale v. Skinner, 32.
Halsey v. Martin, 332. MORTGAGE.
Hambly v. Trott, 677.
Hamilton v. Annapolis Co., 350.
Hamilton v, Elliott, 295.
Hamilton v. Hamilton, 187.
Hanson v. McCue, 197.
Harding v. Funk, 434.
Harding v. Goodlette, 439.
Harebottle v. Placock, 331.
Harkley v. Ogman, 244.
Harlan v. Lehigh Co., 237. LEASE.
Harmer's heirs v. Morris, 569.
Harris v. Burns, 31.
Harris v. Equator Co., 202, 331. POSSESSION.
Harris v. Ryding, 135.

Harris v. Shontz, 27.
Harris v. Tyson, 603. VENDOR AND PURCHASER.
Harrisburg v. Crangle, 125.
Harrison v. Nettleship, 186.
Hart v. Albany, 124.
Harvey v. Archbold, 677.
Harvey v. Lloyd, 443.
Haslam v. Galena Co., 353.
Hatch v. Hawkes, 442.
Haverstick v. Sipe, 112.
Hawes v. Contra Costa Co., 476.
Hawkins v. Reichert, 210.
Hawkshurst v. Lander, 331. POSSESSION.
Hayes v. Waldron, 156.
Hays v. Risher, 434.
Hazard v. Durand, 472.
Hazen v. Essex Co., 430, 439.
Head v. Fordyce, 46. QUIET TITLE.
Heald v. Cooper, 592.
Hebrard v. Jefferson Co., 247. 5 M. R. 270.
Heil v. Strong, 296.
Heilman v. Union Canal, 124.
Heilner v. Battin, 586.
Hellman v. Hellman, 138.
Henshaw v. Bissell, 32, 546.
Hensley v. Tarter, 214.
Hepburn v. Landner, 140.
Hetrich v. Deachler, 113. 525.
Hichings v. Congrieve, 472.
Higgins v. Barker, 26, 46. INJUNCTION.
Higgins v. Mortimer, 385.
Higgins v. Reynolds, 197, 442.
Higgins v. Wortell, 214.
Highland Co. v. Mumford, 46. 2 M. R. 3.
Hilbish v. Catherman, 143.
Hill v. Epley, 139.
Hill v. Hill, 295.
Hill v. King, 175. 4 M. R. 533.
Hill v. West, 167.
Hilton v. Granville, 125.
Hipp v. Babin, 452.
Hitchcock v. Harrington, 62.
Hobart v. Ford, 46. WAY.
Hoby v. Hoby, 49, 52, 61, 66, 69, 73.
Hodges v. New England Co., 472.
Hodgson v. Field, 158.
Hodsoll v. Stallebrass, 102.
Hoeveler v. Mugele, 654. VENDOR AND PURCHASER.
Hollenbeck v. Clow, 245.
Holmes v. Wilson, 103, 106.
Holsman v. Boiling Spring Co., 125.
Horner v. Watson, 159. SURFACE SUPPORT.
Hoskins v. Robins, 281.
Howell v. McCoy, 125.
Howell v. Young, 102.
Hudson v. Nicholson, 100, 103.
Hudson Co. v. Stockbridge Co. 659. RESERVATION.
Huff v. McAuley, 195, 197. LICENSE.
Humbert v. Trinity Church, 249.
Humphreys v. McCall, 215.
Hunter v. Westminster, 513.
Huntington v. Palmer, 476, 479.
Huntley v. Stone, 665.
Huntzinger v. Harper, 620.
Illinois Co. v. Ogle, 655. MEASURE OF DAMAGES.
Incledon v. Burgess, 491, 498.
Indianapolis Co. v. Herkimer, 654.
Irwin v. Corode, 77. WASTE.
Irwin v. Davidson, 452. INJUNCTION.
Irwin v. Shumaker, 298, 620.

Jackson v. Buel, 186.
Jackson v. Hathaway, 385.
Jackson v. Myers, 4.
Jackson v. Woodruff, 607, 609.
James v. Williams, 45, 46.
Jennison v. Kirk, 10, 36. 4 M.R. 504.
Johnson v. Buell, 332, 544. LOCATION.
Johnson v. Rayner, 195.
Johnson v. Sepulbeda, 216.
Johnson v. Towsley, 586.
Johnstown Co. v. Cambria Co., 195, 281. LICENSE.
Johnstown Co. v. Veghte, 159.
Jones v. Geddes, 186.

Jones v. Long, 655.
Jones v. O'Farrel, 654.
Jones v. Wagner, 131, 135. SURFACE SUPPORT.

Kahn v. Old Telegraph Co., 586. PATENT.
Kaine v. Weigley, 620.
Kamphouse v. Gaffner, 20. 2 M. R. 257.
Karns v. Tanner, 303, 654. 5 M. R. 289.
Kauffman v. Griesemer, 125, 131, 136.
Keane v. Cannovan, 322.
Keller v. Nutz, 167.
Kelley v. Kelley, 307.
Kelly's App., 668.
Kelly v. Donahoe, 442.
Kelly v. Taylor, 586.
Kemp v. Pryor, 186.
Kenney v. Brown, 185.
Kent v. Berry, 50.
Ketchum v. Zeve ga, 245.
Kidd v. Laird, 245. 4 M. R. 571.
Kidd v. Teeple, 46.
Kier v. Peterson, 385. LEASE.
Kiler v. Kimbal, 249.
Kimball v. Gearhart, 43. 1 M. R. 615.
Kimball v. Lohmas, 607.
King v. Edwards, 160, 205. 4 M. R. 180.
King v. McCully, 141.
King v. Randlett, 274. 5 M. R. 605.
King v. Talbot, 694.
Kinnersly v. Orpe, 491, 499.
Kleinschmidt v. Dunphy, 28.
Koch & Balliet's Appeal, 483. 4 M. R. 151.
Kramer v. Cleveland & P. R. R., 439.
Kreutz v. McKnight, 295. 6 M. R.

Kneer v. Hoffman, 667.
Kurcyn v. Paugh, 214.

Labar v. Koplin, 307.
Lake v. Tolles, 27, 28.
Lammott v. Bowley, 694.
Lamp ng v. Hyatt, 608, 609.
Lance's App., 443.
Landers v. Bolton, 214.
Lane v. Newdigate, 140.
Lansdale v. Daniels, 42.
Lansing v. Parker, 244.
Larkins' App., 186.
Lathrop v. Bampton, 474.
Law v. Patterson, 296.
Lawson v. Williams, 198.
Lay v. Neville, 214.
Leaming v. Wise, 549. 6 M. R. —.
Leavenworth Co. v. U. S., 36.
Lee v. McLeod, 15, 19.
LeFevre v. LeFevre, 187.
Lehigh Co. v. Lehigh Co., 124.
Lehigh Co. v. Trone, 124.
Leigh Co. v. Independent Co., 46. PLEADING.
Lestor v. Foxcroft, 185.
Lewis v. Carstairs, 186.
Lewis v. Cocks, 24, 452.
Lewis v. Comeford, 140.
Lewis v. Jones, 385.
Lilly v. Ewer, 614.
Lincoln v. Rodgers, 175, 197. TAILINGS.
Livingston v. Peru Co., 607.
Livingston v. Tompkins, 296.
Loan Ass'n v. Topeka, 441.
Locust Mt. Co. v. Gorrell, 136, 141. 5 M. R. 129.
Logan v. Driscoll, 175. 6 M. R. 172.
Lord Lovelace's Case, 139.
Lord Mountjoy's Case, 195, 234, 235 281. LICENSE.
Loring v. Bacon, 186.
Lower Chatam, etc., *In re*, 433.
Lycoming Ins. Co. v. Schollenberger, 296.
Lynch v. Sumral, 186.

Macy v. Goodwin, 589.
Magnaw v. Miner Co., 186.
Magor v. Chadwick, 125.
Magrath v. Hardy, 505.
Mahoney v. San Francisco, 389.

Mallett v. Uncle Sam Co., 226, 332. 1 M. R. 17.
Malson v. Fry, 620.
Mammoth Co.'s App., 140, 141. INJUNCTION.
Mann v. Rogers, 562, 563, 575.
Manning v. San Jacinto Tin Co., 481.
Maples v. Browne, 620.
Marlin v. Willink, 186.
Marvin v. Brewster Co., 656. RESERVATION.
Marsh v. Weckerly, 187.
Marshall v. Shafter, 566, 567.
Martin v. Porter, 385, 389. MEAS. DAMAGES.
Martin v. Riddle, 125, 131, 136.
Mayhew v. Robinson, 244.
Mayo v. Ah Loy, 609.
Mayor, etc. v. Appold, 156, 157.
Mayor of Baltimore v. Comm'rs, 124.
Meason v. Kaine, 139.
Megerle v. Ashe, 42.
Meily v. Wood, 667.
Mercer Co. v. McKee, 654. 5 M. R. 531.
Merrill v. Lane, 186.
Merritt v. Parker, 136, 156, 157.
Mexborough v. Bower, 140. 2 M. R. 92.
Miami Co. v. Wigton, 442.
Michener v. Dale, 670.
Millenovich, Estate of, 682, 707.
Miller v. Casselberry, 123.
Miller v. Laubach, 157.
Miller v. Miller, 113, 139.
Miller v. Myles, 323.
Miller v. Taylor, 330, 543. LOCATION.
Miller v. Troost, 434.
Millington v. Goodtitle, 186.
Milsap v. Stone, 318.
Mine Hill Co. v. Lippincott, 443. RAILROADS.
Ming v. Truett, 31.
Miranville v. Silverthorn, 186, 187.
Mitchell v. Hagood, 332. 1 M. R. 506.
Mitchell v. McCall, 457, 462.
Monongahela Co. v. Blair, 377.
Monongahela Co. v. Kirk, 123.
Montgomery v. Whiting, 562, 576.
Moor v. Magrath, 5.
Moore v. Del Valle, 214.
Moore v. Miller, 620.
Moore v. Rollins, 77.
Moore v. Small, 185.
Moore v. Thompson, 202.
Morgan v. McKee, 543, 550. 3 M. R. 128.
Morgan v. Powell, 389.
Morris Canal Co., *In re*, 434.
Morrison v. Semple, 195.
Morse v. Swan, 31.
Morton v. Hodgdon, 186.
Mott v. Burnett, 244.
Mt. Diablo Co. v. Callison, 247. LODE.
Mowry v. Whitney, 564.
Mudgett v. Horrell, 655.
Mulford v. Le France, 612.
Munn v. Illinois, 148.
Murphy v. Hubert, 186.
Myers v. Hart, 620.
McCallum v. Germantown Co., 125.
McCandless' App., 422.
McConnell v. Denver, 45. PARTNER.
McCormick's App., 667.
McCormick v. McConnell, 296.
McCurdy v. Alpha Co., 1. 3 M. R. 278.
McDonald v. Bear River Co., 239. 1 M. R. 626.
McDonald v. Hewett, 662.
McEwen v. Johnson, 216.
McGan v. O'Neil, 20.
McGarrity v. Byington, 178, 515, 586. 2 M. R. 311.
McGillivray v. Evans, 45, 72. PARTITION.
McGovern v. Hoesback, 620.
McGowin v. Remington, 187.
McIldowny v. Williams, 620.
McKee v. Green, 306.
McKeehan v. Wilson, 195.
McKellip v. McIlhenny, 187, 190.
McKinney v. Reader, 187.

McKinney v. Smith, 655. 1 M. R. 650.
McKnight v. Kreutz, 296. 6 M.R. —
McKnight v. Ratcliff, 130. PARTNER.
McMahan v. McMahan, 296.
McNair v. Compton, 281.
McNeillie v. Acton, 707.
McPherson v. McCunliff, 167.

Napa Valley Co. v. Napa County, 439.
Nass v. Vanswearingen, 139.
Neall v. Hill, 472. 1 M. R. 80.
Neel v. Neel, 77. TENANT FOR LIFE.
Nevada Co. v. Kidd, 118.
New Albany v. Burke, 481.
New Central Co. v. George Creek Co., 443.
Newcomb v. Smith, 432, 439.
Newman v. Newton, 332.
Newman v. Rutter, 296.
Newmarch v. Brandling, 140.
Niagara Co. v. Bachman, 654.
Niagara Co. v. Bunker Hill Co., 318.
Nichols v. Lewis, 296.
Nichols v. Marsland, 82.
Nitzell v. Paschall, 167.
Niven v. Belknap, 32.
Noble v. Sylvester, 661. PERSONAL PROPERTY.
Noonan v. Albany, 153.
North P. R. R. v. Reynolds, 31.
Northrop v. Wright, 249.
Noteware v. Sterns, 10. 4 M. R. 650.
Nudd v. Wells, 550.

Oakland Co. v. Fielding, 296.
Ogburn v. Connor, 158, 197.
Old Telegraph Co. v. Central Co. 449. INJUNCTION.
Olmstead v. Camp, 432.
Oregon Co. v. Trullenger, 523. 4 M. R. 247.
Original Co. v. Winthrop Co., 251.
Ormsby v. Douglas, 244.
Orr v. Chase, 139.
Orr v. Haskell, 655. 4 M. R. 492.
Ortman v. Dixon, 46.
Ostrum v. Bixby, 245.
Outram v. Morewood, 502. 5 M. R., 484.
Overman Co. v. Corcoran, 424, 443. 1 M. R. 691.

Painter v. Harding, 187.
Panton v. Holland, 112.
Parke v. Kilham, 26, 586. 4 M. R. 522.
Parker v. Smith, 185.
Parrott v. Byers, 473, 586. STOCK.
Patterson v. Hitchcock, 559, 598. 5 M. R. 542.
Patterson v. Keystone Co., 274, 607, 608. SALE.
Payne v. Treadwell, 253, 566.
Peachy v. Somerset, 296.
Peebles v. Reading, 295.
Peik v. Railway Co., 148.
Peisch v. Dickson, 592.
Penn. Co. v. Canal Com'rs, 123.
Penn. Co. v. Owens, 331, 332, 655. POSSESSION.
Penruddock's Case, 104.
People v. Best, 649.
People v. Parks, 159.
People v. Pittsburgh Co., 443. QUO WARRANTO.
People v. Whitney, 649.
Perrin v. Garfield, 137.
Pettigrew, v. Evansville, 156.
Philhower v. Todd, 186.
Phillips v. Gregg, 323.
Pickering v. Stapler, 167.
Pickford v. Grand Junction Co., 124.
Pierce v. Cloud, 296,
Poire v. Wells, 332.
Pollett v. Long, 156.
Post v. Avery, 298.
Potter v. North, 281.
Pratt v. Hull, 306.
Pratt v. Pond, 186.
Prescott v. White, 141.
Prescott v. Williams, 141.
Priest v. Union Canal Co., 216. 4 M. R. 515.

Pritchett v. Jones, 662.

Queen v. Blakemore, 503, 505.
Queen v. Chorley, 187.
Queen v. Eastern C. R'y, 124.
Queen v. Haughton, 503, 505.
Quirk v. Falk, 46, 163. 2 M. R. 19.

Raffetto v. Fiori, 24, 25. TRESPASS.
Railroad Co. v. Hagan, 296.
Railroad Co. v. Heister, 358.
Ramsay v. Chandler, 154. 4 M. R. 240.
Randolph v. Harris, 214.
Rangely v. Spring, 186.
Raritan Co. v. Veghte, 19.
Reamer v. Nesmith, 594. 5 M. R. 610.
Reed v. Calderwood, 214.
Reed v. Spicer, 45, 612. 4 M. R. 330.
Reg. v. Gifford, 124.
Reid v. Recorder of Manches. 124.
Removal Cases, 482.
Rerick v. Kern, 139, 187, 190.
Repsher v. Wattson, 620.
Rex v. Aresford, 296.
Rex v. Miller, 49.
Rex v. Neville, 123.
Rhea v. Forsyth, 124, 140.
Rice v. Bunce, 523.
Richards v. Schlegelmich, 601. 3 M. R. 78.
Richardson v. McNulty, 530. 1 M. R. 11.
Richardson v. Smith, 214.
Ripon v. Hobart, 124, 126.
Ritger v. Parker, 137.
Roach v. Gray, 655. 4 M. R. 450.
Roath v. Driscoll, 116.
Roberts v. Read. 101, 102.
Robertson v. Jackson, 614.
Robertson v. Robertson, 185.
Robinson v. Black Diamond Co., 159. TAILINGS.
Robinson v. Byron, 124.
Robinson v. Imperial Co., 328. MILL SITE.
Robinson v. Justice, 187.
Robinson v. Smith, 444, 472, 3 M. R. 443.
Rockwell v. Morgan, 77.
Rogers v. La Fayette Works, 473.
Rogers v. Morris, 141.
Rogers v. R. E. Lee Co., 683. 2 M. R. 71.
Rosewell v. Prior, 104.
Rowe v. Bradley, 669. TRESPASS.
Rowe v. Table Mt. Co., 210.
Russel v. Clark, 186.
Russell v. Russell, 77.
Ryckman v. Gillis, 659.
Rylands v. Fletcher, 79, 81, 82. 6 M. R. 129.

Sacramento Co. v. Showers, 311,312.
St. Louis Co. v. Green, 332.
St. Louis Co. v. Kemp, 332, 560. PATENT.
St. Louis & V. R. R. v. Stockton, 439.
Salem Bank v. Gloucester Bank, 654.
Salmon v. Howitz, 385.
Sanders v. Norman, 123.
Sanderson v. Haverstick, 385, 386.
San Diego v. San Diego R. R., 473.
Saunder's Case, 49, 66.
Savill's Case, 199.
Sayer v. Pierce, 483. 1 M. R. 72.
Schermerhorn v. Von Volkenburgh, 167.
Schieffelin v. Harvey, 309.
Schuylkill Nav. Co. v. Loose, 124.
Schuylkill Nav. Co. v. Moore, 123.
Scott v. Wells, 662.
Sears v. Taylor, 214. 5 M. R. 318.
Sharon v. Minnock, 17, 30.
Sharon Iron Works v. Erie City, 296.
Shaw v. Bebee, 186.
Sheaffer v. Sheaffer, 295.
Sheppard v. Oxenford, 125.
Sherwood v. Meadow Valley Co., 506. STOCK.
Shields v. Arndt, 124, 156.
Shoenberger v. Lyon, 658. RESERVATION.

Shortz v. Unangst, 138.
Siboni v. Kirkman, 681.
Sieber v. Frink, 38.
Sierra Nevada Co. v. Sears, 506. INJUNCTION.
Skinner v. Dayton, 139.
Smedley v. Irwin, 420.
Smith v. Adams, 117.
Smith v. Athern, 42.
Smith v. Barrett, 185.
Smith v. Fagan, 45. 1 M. R. 87.
Smith v. Fletcher, 79. 6 M. R. 192.
Smith v. Johnston, 167.
Smith v. Hulett, 641.
Smith v. Kenrick, 81, 129, 136, 156. 6 M. R. 142.
Smith v. Lorillard, 321.
Smith v. McIver, 186.
Smith v. O'Hara, 30, 46. 1 M. R. 671.
Smith v. Pipe, 315.
Smith v. Richmond, 214.
Smith v. Wilson, 592, 614.
Snodgrass v. Ward, 654. 4 M. R. 306.
Somerset Co. v. Harcourt, 187.
Soper v. Buf. & R. R. R., 654.
South Fork Co. v. Gordon, 8, 9.
Speake v. Richards, 505.
Speering's App. 472.
Spinney, ex p. 437.
Spokes v. Banbury Board, 125.
Springfield v. Harris, 526.
Srodes v. Caven, 662.
Stauffer v. Young, 620.
Steele v. Phœnix Ins. Co., 298.
Stevens v. Stevens, 77, 187.
Stewart v. Mumford, 556. 5 M. R. 555.
Stiles v. Comstock, 245.
Stine v. Sherk, 620.
Stith v. Lookabill, 332.
Stockton R. R. v. Stockton, 440, 442.
Stockwell v. Hunter, 186.
Stone v. Bumpus, 332, 515. 4 M. R. 271.
Stouffer v. Latshaw, 620.
Stoughton v. Leigh, 59, 61, 66, 69, 71, 77. 5 M. R. 47.
Stow v. Tifft, 63.
Stowell v. Flagg, 439.
Strickler v. Todd, 187.
Stuart v. White, 462. 5 M. R. 454.
Sublette v. Tinney, 480.
Sullivan v. Iron Silver Co., 251.
Sun. & Erie R. R. v. Hummell, 124.
Swartz v. Swartz, 187, 190.
Sweet v. Cutts, 156.
Sweet v. Tuttle, 244.
Swift v. Kingsley, 245.

Table Mt. Co. v. Stranahan, 274, 329. LOCATION.
Talbot v. Hudson, 401, 430.
Taylor v. Carryl, 186.
Taylor v. Harrison, 536.
Taylor v. Holter, 45. 3 M. R. 322.
Taylor v. Rundell, 454.
Taylor v. Stendall, 104.
Taylor v. Wilkinson, 123.
Tennig v. Higgs, 186.
Texer v. Gorwin, 215.
Thien v. Voegtlander, 439.
Thomas v. Bowman, 641.
Thomas v. Brady, 123.
Thomas v. Northern Liberties, 123.
Thomas v. Thomas, 620.
Thompson v. Gibson, 100, 107.
Thompson v. Lee, 46, 215. 1 M. R. 610.
Thompson v. Lynch, 214.
Thompson v. Toland, 506. 2 M. R. 77.
Tide Water Co. v. Coster, 433.
Tillotson v. Smith, 156, 157.
Titcomb v. Kirk, 443. 5 M. R. 10.
Titusville Water Works' App., 669. LEASE.
Todd v. Austin, 432.
Todd v. Strickler, 190.
Toombs v. Hornbuckle, 27. STAT. LIMITATIONS.
Touchard v. Crow, 238.
Trevivan v. Lawrence, 503, 505.
Trexell v. Lehigh Iron Co., 191.
Tripp v. Bishop, 620.
Trout v. McDonald, 108, 159, 586. LEASE.

Tulley v. Harloe, 644.
Turner v. Tuolume Co., 46. 1 M. R. 107.
Tuolumne Co. v. Chapman, 26. NUISANCE.
Tuolumne Co. v. Columbia Co., 46. NEGLIGENCE.
Twaddell's App., 682. GUARDIAN.
Tyler v. Wilkinson, 112, 123.

Union Co. v. Bliven Co., 193, 331. 3 M. R. 107.
U. S. v. Union Pacific R. R., 472.

Valentine v. Mahoney, 562, 563, 576.
Valley Co. v. Brown, 368, 424. 5 M. R. 397.
Van Bergen v. Van Bergen, 124.
Van Bokkelen v Cook, 707. STAT. LIMITATIONS.
Vandike's App., 667.
Vandike v. Rosskam, 667.
Van Valkenburg v. Huff, 327. LOCATION.
Van Vleck v. Clark, 186.
Varick v. Smith, 440.
Venard v. Cross, 434.
Verplanck v. Insurance Co., 472.
Verplank v. Wylet, 295.
Vincent v. Huff, 281.
Von Schmidt v. Huntington, 250. 6 M. R. —.
Vooght v. Winch, 503.

Waddell's App., 443.
Waffle v. New York Cent. R. R., 156, 157.
Waffle v. Porter, 156.
Wallace v. Fletcher, 138.
Walls v. Hartley, 295.
Walsh v. Carwell, 620.
Ward v. Petifer, 296.
Ware v. Cowles, 186.
Waring v. Crow, 237, 238, 250. 5 M. R. 204.
Watkins v. Peck, 186.
Watson v. Cornell, 46.
Watson v. Pittsburgh R. R., 124, 375, 380.
Weaver v. Eureka Co., 46. 1 M. R. 642.
Webb v. Smith, 587.
Weeks v. Howard, 126.
Weill v. Baldwin, 46.
Weill v. Lucerne Co., 37, 559. 3 M. R. 372.
Wells v. McPike, 214.
Wendell v. Van Rensselaer, 32.
Wentworth v. Cock, 679, 681, 706. 2 M. R. 470.
Wesley Church v. Moore, 187.
Westbourne v. Mordant, 100, 103.
Westenberger v. Reist, 295.
West Point Co. v. Reymert, 661. INJUNCTION.
West Va. Co. v. Volcanic Co., 434. 5 M. R. 389.
Wheatley v. Baugh, 112, 113, 116. SPRINGS.
Wheatley v. Chrisman, 125. NUISANCE.
Wheeler v. Toulson, 296.
Whetstone v. Bowser, 116.
Whigham's App., 667, 668.
White v. Abernathy, 216.
White v. Booth, 124.
White v. Chapin, 156.
White v. Cox, 562.
Whitehouse v. Wolverhampton Co., 368, 443.
Whiting v. Fond du Lac R. R., 440.
Whitsett v. Kershaw, 289.
Whitfield v. Bewit, 51, 52, 61, 66.
Whittaker v. Howe, 140.
Wiggins v. Burkham, 549.
Wigham v. Pickett, 620.
Wild v. Holt, 335, 389. POSSESSION.
Wilkins v. McCue, 26.
Wilkinson v. Stafford, 682. TRUST.
Wilbur v. Lynde, 473.
Willcox v. Smith, 698.
Williams v. Baker, 36.
Williams v. Gale, 136, 156.
Williams v. Groucott, 82. SURFACE.
Williams v. Mitchell, 309.
Willson v. Cleaveland, 240.
Wilmington Co. v. Allen, 586. LEASE.
Wilson v. Black Bird Co., 439.

Wilson v. Waddell, 81, 83, 88. SURFACE SUPPORT.
Winans v. Christy, 322.
Winans v. Hassey, 654. 2 M. R. 284.
Winchester v. B. & S. R. R. Co., 540.
Winchester v. Knight, 707.
Winfield v. Bacon, 186.
Winona Co. v. Blake, 148.
Wixon v. Bear River Co., 218. 1 M. R. 656.
Wolcott v. DesMoines Co., 36.
Wood v. Carpenter, 481.
Wood v. Lake, 187.
Wood v. Sutcliffe, 125.
Wood v. Waud, 124, 125.
Wood Co. v. King, 650.
Woodruff v. N. Bloomfield Co., 10, 46.
Woods v. Wilson, 186.
Woodworth v. Knowlton, 214.
Wooley v. Inh. of Groton, 195.
Woolman v. Garringer, 45, 46. 1 M. R. 675.
Wordsworth v. Harley, 102.
Wright v. Oroville Co., 472. 3 M. R. 558.
Wrottesley v. Bendish, 296.
Wyoming Co. v. Price, 442.
Wyrley Co. v. Bradley, 442. 2 M. R. 89.
Youngman v. Linn, 226. 2 M. R. 443.
Youngs v. Bell, 245.
Yount v. Howell, 238.
Youst v. Martin, 295, 296.
Yunker v. Nichols, 14, 197. IRRIGATION.

TABLE OF HEADINGS.

PAGE.

DITCH (continued)..... 1

DOWER..... 47

DRAINAGE..... 78

DUMP..... 160

EASEMENT..... 163

EJECTMENT..... 198

EMINENT DOMAIN..... 333

EQUITY..... 444

ESTOPPEL..... 484

EVIDENCE..... 587

EXCEPTION..... 656

EXECUTION..... 662

EXECUTORS AND ADMINISTRATORS..... 670

MINING REPORTS.

VOL. V.

FOGUS, Appellant, v. WARD ET AL., Respondents.

(10 Nevada, 269. Supreme Court, 1875.)

[1] **Conveyance of half interest not enlarged by sweeping clause.** A deed of water rights conveyed "the undivided one half" of a certain ditch and flume from the Truckee river, and the granting clause was followed by "Together with" "all the water of said Truckee river which may or can be led through said ditch and flume": *Held*, that the subject-matter of the grant was an undivided half interest in the ditch, flume and water therein carried, and not *all* the water, as respondent contended.

Construction of sweeping clause. *The sweeping clause* can not be construed except in context with the granting clauses.

Appeal from the District Court of the Second Judicial District, Washoe County.

ROBERT M. CLARKE, for appellant.

ELLIS & KING, for respondents.

By the Court, EARLL, J.

On and prior to the 20th day of January, 1869, one M. C. Lake owned and possessed in fee the whole of the water ditch, flume, franchise and water privilege in controversy in this action, and the parties respectively claim title from him. The defendants claim the whole thereof, under a deed from said Lake to the plaintiff, dated January 20, 1869, the title thus acquired having, by subsequent mesne conveyances, passed from the said plaintiff and vested in Andrew Forbes, the lessor of the defendants. The plaintiff claims an undi-

[1] *McCurdy* v. *Alpha Co.*, 3 M. R. 278.

vided half of said ditch, flume, etc., by virtue of an indenture of lease executed to him by said Lake, subsequent to the execution and delivery of the said deed. The judgment of the court below turned upon the construction of said deed, and it is conceded by the counsel for both parties, that the construction thereof is the only question presented for consideration in this appeal.

So much of the deed as is necessary to be considered reads as follows: "That the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the further consideration of the large sums of money paid out and expended by the said party of the second part, in repairing, improving, and, in fact, constructing a certain water ditch and flume, hereinafter described, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all of the undivided one half of a certain ditch and flume situate in and near the said town of Reno, and commencing near the southeast corner of what was formerly known as H. Countryman's ranch, and about five hundred feet above the southwest corner of block T, in said town of Reno, and running thence in an easterly direction, crossing Virginia street in said town at Front street, thence through blocks W, X, Y, and S, to S. C. Fogus's mill, standing on the south division of the irregular-shaped block bounded on the north by Commercial row, on the east by the forty-foot street east of the town plat, on the south by Front street, and on the west by East street; said ditch and flume being now used to convey the waters of the Truckee river to said mill; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the water of said Truckee river which may or can be led or conveyed through said ditch and flume, or either of them, or as the same may be enlarged at the cost, charge and expense of the party of the second part, his heirs and assigns."

The judgment of the district court seems to have proceeded upon the theory that the last clause in the premises of this deed controls the preceding clauses therein, and that the effect

of the words, "and all the water of the Truckee river," etc., was to divest out of Lake, the grantor, and vest in Fogus, the grantee, the whole instead of one half of the property and water privilege in question; and this theory is now urged on behalf of the defendants in this court.

The defendants claim that the last clause in the premises or granting part of the deed conveys to the grantee therein, his heirs and assigns, all the water of the Truckee river diverted by the said ditch and flume as the same were then constructed, or as could thereafter be diverted by any enlargement thereof at the cost and expense of the said grantee, his heirs or assigns; and they argue that, as the use of the entire ditch and flume is essential to the beneficial use and enjoyment of the water thus conveyed, such use, by implication, also vested in said grantee.

The principle that where one thing is granted, whatever is necessary to its beneficial use and enjoyment by implication is also granted, is conceded, but we do not think the principle can properly be applied to the deed under consideration. From a view and comparison of the whole deed we think it clearly appears that the subject-matter of the grant was an undivided half of the ditch and flume and the water of the Truckee river diverted thereby, and the water privilege incident thereto; and also extending to the grantee, his heirs, etc., the right, at any time, to enlarge the ditch and flume, and to receive the benefits resulting from such enlargement.

Among the rules which are universally observed in the construction of all parts of all kinds of deeds, the following are stated in Sheppard's Touchstone, 86:

"1. That the construction be favorable, and as near to the minds and apparent intents of the parties as possible it may be and law will permit. * * *

"2. That the construction be reasonable, and according to an indifferent and equal understanding; and therefore, if I grant to another, common in all my manor, this shall be expounded to extend to commonable places only, and not in my gardens or orchards, etc. And if I grant to one estovers out of my manor, he may not by this cut down my fruit trees. And if one grant to me to dig in all his lands for tin, I may not, by this grant, dig under his house. And if one grant

me common for all my beasts, this shall be taken for all my commonable beasts, and not for goats and the like. And if one grant me all the trees in his manor, by this I shall not have his apple-trees.

"3. That too much regard be not had to the native and proper definition, significations and acceptances of words and sentences, to pervert the simple intentions of the parties. * *

"4. That the construction be made upon the entire deed, and that one part of it doth help expound another, and that every word (if it may) may take effect and none be rejected, and that all the parts do agree together, and there be no discordance therein. *Ex antecedentibus et consequentibus est optima interpretatio;* for, *turpis est pars quæ cum suo toto non convenit. Maledicta expositio quæ corrumpit textum.* If a man make a feoffment of all his land in D., with common *in omnibus terris suis*, this common shall be intended in the lands granted in D. only, and not elsewhere; for it must be understood *secundum subjectam materiam.*"

In 3 Atk. 136, it is said by Chief Justice WILLES that words are not the principal thing in a deed, but the intent and design of the grantor; and the words are to be construed in a manner most agreeable to the meaning of the grantor, and words which are merely insensible are to be rejected. And in *Jackson* v. *Myers*, 3 John. 388, KENT, C. J., states the rule thus: "The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the whole instrument, and with an endeavor to give every part of it meaning and effect."

In *Flagg, Administrator*, v. *Eams et al.*, 40 Vt. 22, KELLOGG, J., said: "It has always been recognized as a cardinal principle in the interpretation of deeds, that the intention of the grantor, when it is plainly and clearly expressed, or can be collected or ascertained from the deed, is to be observed and carried into effect, unless it is in conflict with some rule of law; and that whatever is repugnant to the general intention of the deed, or obvious particular intention of the grantor, is rejected, if such intention is consistent with the rules of law."

Applying these rules of construction to the interpretation of this deed we think there can be no difficulty in arriving at the intention and equal understanding of the parties thereto. Lake was seized and possessed of the entire ditch, flume and water privilege, and in consideration of Fogus having expended money in the repairing and construction of said ditch and flume, Lake executed this deed, in the first clause of which the grant is specifically limited to an undivided half of the property and water privilege, minutely and particularly describing the same; then follows a general sweeping clause, in which occur the words relied upon by the defendants. But we think the first clause in the premises of the deed clearly indicates the intention of the parties thereto, and that the subsequent general clause must be interpreted as limiting the extent of the grant to its specific and particular description: 2 Story on Cont., Sec. 642; *Doe d. Meyrick* v. *Meyrick*, 2 Excheq. Crompton & Jervis R. 229; *Moor* v. *Magrath*, 1 Cowper, 9. The precise question presented here was determined in the last case cited, and fully supports our construction of the deed under consideration. That was a case in which one Michael Moor, being seized in fee of an undivided moiety of certain lands in the counties of Mayo and King, in right of his wife, and also seized of certain other lands, etc., in the county of Roscommon, for which the ejectment was brought, and of other lands in the counties of Clare and Galway, the latter of which were his paternal estate, executed a deed, minutely describing the lands in the counties of Mayo and King, and then proceeds as follows: "Together with *all other* the said Michael Moor's *lands, tenements and hereditaments in the kingdom of Ireland.*" It was held that the grantor did not intend to convey any lands but these held in right of his wife; and Lord Mansfield, in delivering the opinion of the court, observed: "It is very common to put in a sweeping clause; and the use and object of it, in general, is to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those that have been already mentioned."

The case of *Moor* v. *Magrath* is not distinguishable from this; and from a view of the whole deed, and a comparison

of the different clauses therein, we are of opinion that, by the established rules of construction, the last clause in the premises of this deed must be held to refer to the preceding clause, and limited to the estate therein particularly described, together with the further right to the grantee, his heirs and assigns, at any time, and at his or their expense, to enlarge the capacity of the ditch and flume, and receive the benefits accruing from such enlargements.

The judgment of the district court is reversed, and the cause remanded for a new trial.

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[1] REYNOLDS ET AL. v. HOSMER.

(51 California, 205. Supreme Court, 1876.

[2] **Relation of upper and lower sections of ditch—Consistent decisions on same matter.** The Supreme Court of the United States having held, as to a certain water ditch or canal several miles in length, that different parcels of it are separate structures, the Supreme Court of California are compelled to hold as to the same property that there having been a sale of the lower section separate from the upper section, "there is no legal duty upon the part of the owner of the upper section to p r-mit" the water brought by the upper section to flow into the lower section, and there was error in allowing the value of the waters to be considered in fixing the value of the lower section.

Appeal from the District Court, Twelfth Judicial District, City and County of San Francisco.

This case was before this court on an appeal from the judgment, and is reported in 45 Cal. 616. The facts are there stated, so that it is unnecessary to repeat them here. When that appeal was taken a motion for a new trial was pending in the court below. A new trial was granted on 24th day of July, 1874. The reason for granting a new trial was, that in estimating the damages which the plaint-

[1] S. C. 4 M. R. 656.

[2] This opinion is based merely upon the fact that the point was *res adjudicata inter partes* following the opinion cited from 6 Wall. as a corollary and is not a decision on the merits. See *Ellison* v. *Jackson Co.*, 4 M. R. 559.

iff had sustained by reason of the sale of the lower section of the ditch on the judgment enforcing the lien, the court, on the trial, took into consideration the value of the water flowing from the south fork at the head of the ditch, down the ditch. The peculiar facts in relation to the matter are thus: The ditch was constructed by the South Fork Canal Company, and extended from the south fork of the American river to the grand reservoir near Placerville, a distance of twenty-four miles. From the head of the ditch to Long cañon was eight miles. The circuit court gave Gordon a lien on the whole ditch, from which judgment an appeal was taken to the Supreme Court of the United States. Pending the appeal the whole ditch was sold on the judgment. The Supreme Court of the United States held that Gordon's lien was only on the upper section of the ditch from the south fork to Long cañon. The point here in controversy is, whether the owners of the lower section of the ditch, from Long cañon to the grand reservoir, have any legal interest in the water flowing into the ditch, at its head, from the south fork of the American river. The plaintiffs appealed from the order granting a new trial.

CRANE & BOYD, PARKER & ROCHE and GEORGE BLANCHARD, for the appellants.

SOLOMON A. SHARP and GEORGE E. WILLIAMS, for respondent.

By the Court, NILES J.

It is not questioned by the plaintiffs that the defendant, as the owner of the upper canal between the south fork of the American river and Long cañon, had a right to the use of the waters of the south fork for the purposes for which the canal was constructed. But it is contended that this admitted right of the defendant was not exclusive and absolute in him, but was shared by the plaintiffs, in some undefined relation, by virtue of their ownership of the lower canal leading from Long cañon to the grand reservoir.

This claim is based upon the assumption that the entire canal, from the grand reservoir to the south fork, was a con-

tinuous aqueduct constructed by the same party—The South Fork Canal Company—and in accordance with one original plan; and that, therefore, the right to the use of the waters of the south fork appertained to the ditch throughout its entire length, and not to a single section or portion of it.

The defendant acquired his title by purchase at a sale under a decree of foreclosure of a mechanic's lien for labor upon and materials used in the construction of what is termed the upper canal or section.

The plaintiffs are the successors in interest of the South Fork Canal Company, the original projectors and owners of both the upper and lower sections. In the case of *South Fork Canal Company* v. *Gordon*, 6 Wall. 561, the validity and extent of the lien of Gordon came in question before the Supreme Court of the United States. In that case it was earnestly claimed by Gordon that the canal, including the upper and lower sections, was an entirety, and that the whole was subject to his lien. It was contended by the canal company, with equal earnestness, that the lien should be restricted to the branch or division of the canal upon which the work was actually done, and not extended over the entire structure. The court adopted the latter view, holding that the two parts of the canal, the upper and lower sections, being constructed by different contractors and at different times, and being fed, in part, from different sources, were, in effect, separate and distinct works, and therefore confined the lien of Gordon to the upper section, extending from Long cañon to the south fork.

Whatever might have been our opinion upon this question as an original proposition, we must accept this decision as a determination of the rights of the parties here. In accordance with it the defendant, by his purchase under the Gordon decree, became the owner of the canal between Long cañon and the south fork.

We are of opinion that the defendant was entitled to the absolute use of the waters of the south fork by virtue of his ownership of his canal, and that the court below erred in considering the value of any portion of this water right in estimating the value of the lower canal.

The new trial was properly granted.

Order affirmed.

Mr. Chief Justice WALLACE delivered the following concurring opinion:

I concur. The title of Hosmer, the respondent here, to the water flowing, or to flow, in that portion of the canal next to and adjoining the south fork of the American river, called the "upper section," originating, as it does, in the lien of Gordon, is necessarily co-extensive with that lien. If, therefore, the lien of Gordon attached to the "upper section," as a distinctive thing, and one wholly disconnected from the "lower section" of the canal, the title derived through the foreclosure of that lien must be a title to the "upper section," wholly dissevered from the remainder of the general work. That the lien of Gordon was of this distinctive and exclusive character was directly determined by the Supreme Court of the United States in a suit in equity involving the validity and extent of the lien, to which suit the parties here, or their predecessors in interest, were parties: *Canal Company* v. *Gordon*, 6 Wall. 561. The decree of the Circuit Court of the United States for the Northern District of California, which had proceeded upon the ground of the indivisibility of the entire canal, was reversed for error in that respect, the Supreme Court holding that the upper and lower sections of the general canal were distinct and independent works, and declaring that "a different principle would produce confusion and lead to serious evils." In view of this decision, constituting, as it does, the law of the case between the parties here, there is no legal relation between the "upper section" and the "lower section" of the canal in controversy; there is no legal duty upon the part of the owner of the "upper section" to permit the waters of the south fork of the American river to flow into the "lower section" of the canal, and consequently, there was error in allowing the value of these waters to be considered in fixing the value of the "lower section."

Neither Mr. Justice CROCKETT nor Mr. Justice RHODES expressed an opinion.

TITCOMB v. KIRK.

(51 California, 288. Supreme Court, 1876.)

[1] **Construction of United States mining acts—No right of way without damages.** The mining acts of Congress of 1866, 1870 and 1872 (Rev. Stats., §§ 2318-2342) do not grant to the owner of ditches on the public lands any right not "recognized and acknowledged by the local customs, laws and the decisions of the courts;" they do not authorize the construction of a ditch across the mining claim of another, where such mining claim was located prior to the ditch.

[2] **Relation of water to mining.** Review of the enlarged use of water by progress in the processes of mining for placer deposits; with the history of the recognition of its necessity, first by the action of the miners, then by the local courts and finally by congressional action.

Appeal from the District Court, Fourteenth Judicial District, County of Placer.

The gold fields on the Pacific coast, and on the eastern slopes of the Rocky Mountains, were situated on the public lands of the United States. These fields were also in mountainous districts through which flowed numerous rivers and small streams of water. This water was necessary to separate the gold from the earth. It had to be turned, by means of ditches, from the beds of the rivers, cañons and ravines, where it flowed, upon the sides and summits of the hills and mountains, where the deposits of gold-bearing earth were found. These ditches or canals, many of them, extended for twenty, thirty and forty miles, and cost hundreds of thousands of dollars each, and were built by capitalists for the purpose of conveying and selling water to the owners of mining claims. Others were shorter, and were dug by claim owners for the purpose of conveying smaller quantities of water to particular claims. The water was at first used by conducting a few inches from the ditches into sluice-boxes with riffles on the bottom and then shoveling the earth into the boxes, where it was dissolved by the water, and, being carried down by the current, left the gold on the bottom.

[1] *Jennison* v. *Kirk*, 4 M. R. 504; *Noteware* v. *Sterns*. Id. 648.
[2] *Woodruff* v. *North Bloomfield Co.*, 1 West C. R. 183.

This method of work could only be used where the earth above the bed-rock was shallow—say from six inches to six feet in depth. Claims of this character were soon exhausted. To work the more extensive and deep deposits, where the earth and gravel are from ten to three hundred feet in depth, the "hydraulic process," as it is called, was adopted. To work by this process, the ditch must have considerable altitude above the mining claim. The water is turned into an iron pipe, and is ejected from a nozzle at the lower end of the pipe under a pressure of from one to three or four hundred feet against the bank of gold-bearing earth.

Conflicts soon began to take place between the owners of mining claims, the owners of ditches and the owners of mining claims and ditches. These were settled (before the organization of courts) by miners' meetings, and in a short time customs were in force regulating, not only the size of mining claims, but the conflicting rights of miners and ditch owners. The rule established was that of priority—first in time, first in right. The legislature then provided that, in actions concerning mining claims, proof should be admitted of the customs in force at the diggings, and that such customs should be the law when not in conflict with the laws and Constitution of the State. The courts also adopted the same rule of decision. By this rule, the constructor of a ditch could not excavate it across a mining claim which had been located before the location of the ditch, without the consent of the miner. The location of a ditch consisted in placing written notices at or near its head, and marking out its general route. When this was done, the ditch acquired a right of way, provided its projectors immediately proceeded in good faith to excavate the same and appropriate the water. By the United States statutes in force, both miners and ditch owners were trespassers on the public lands, and could have been removed by the military. The government, however, did not interfere, nor did Congress pass any act upon the subject until 1866. Then the act of July 26, 1866, referred to in the opinion, was passed. This act was amended in 1870, and in 1872 an "Act to promote the development of the mineral resources of the United States" was passed.

These acts contain the expression of the sovereign legis-

lative will regarding the general right of possession of the public lands in the mineral regions. Section one of acts of 1866 and 1872 (See 1 R. S. U. S., Sec. 2319) provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States * * * under regulations prescribed by law, and according to the local customs or rules of miners * * * not inconsistent with the laws of the United States." Section three of the act of 1872 (1 R. S. U. S., Sec. 2322) further provides in respect to vein, lode or ledge mines, prior to patent obtained, that they * * * "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," (the extent of which is particularly described), and gives also the right, and provides the method of obtaining title thereto by patent. Section twelve of the act of 1870 (R. S. U. S., Sec. 2329) provides that "claims usually called 'placers,' including all forms of deposits except veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims:" etc.

Section nine of the act of 1866 (See 1 R. S. U. S., Sec. 2339) provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." The section further provides for liability for damage done to the possessions of settlers on the public domain in the construction of ditches and canals. The possessions of settlers last mentioned are defined to be "homesteads" on lands which are "agricultural" and not "mineral," situate within the mineral regions. (Secs. 10 and 11, act 1866.) By section seventeen (act 1870, R. S. U. S., Sec. 2340) it is provided that "all patents granted, or pre-emption or homesteads

allowed, shall be subject to any vested rights and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." It is also provided (Sec. 16, act 1872, R. S. U. S., Sec. 2344) that "nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

The case at bar was thus: In the year 1873, the plaintiff located and constructed a ditch for the conveyance of water from the south fork of Shirt-tail cañon to Georgia Hill, in the county of Placer. The ditch was about seventeen miles in length and cost about eighteen thousand dollars, and would carry one thousand inches of water. At a point on the line of the ditch, about five miles below its head, the defendant owned a mining claim one thousand feet in width, across which the ditch was excavated. This claim was from thirty to fifty feet or more in depth, and it could be worked only by "hydraulic process." The claim was located more than ten years before the ditch was located. In the winter of 1873–4, the defendant, by means of water, washed away the ditch for a distance of about one hundred feet where it crossed his claim, and washed away the soil underneath to the depth of about twenty feet. The plaintiff constructed a flume over this space, in which the water flowed, but the defendant threatened to destroy it. The defendant washed away the ditch in the ordinary working and development of his mine. The plaintiff brought this action for damages, and to obtain an injunction. The court below rendered judgment for the defendant and the plaintiff appealed.

B. F. MYERS and J. M. FULWEILER, for the appellant.

HALE & CRAIG, for respondents.

By the COURT.

Appellant urges that he should have had judgment, in accordance with the prayer of his complaint, under an act of Congress entitled "An act granting the right of way to ditch

and canal owners," approved July 26, 1866, and an act amendatory thereof, approved July 9, 1870.

The provisions of the statutes referred to and of the "Act to promote the development of the mineral resources of the United States," approved May 10, 1872, should be considered and construed together; and it is apparent that it was the purpose of the legislation, taken as a whole, to recognize in, and confirm to, the respective classes of licensees therein mentioned, the same rights which were accorded to them by the State courts prior to the passage of the acts of Congress.

There is nothing in the ninth section of the act of 1866 which requires of us to hold that the defendant's right to possess and enjoy his mining claim must be subordinated to the right of plaintiff to construct his ditch. The clause in the ninth section, "and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed," can not be construed to enlarge the grant to ditch owners, so as to include a right *not* "recognized and acknowledged by the local customs, laws and the decisions of the courts." Nor does the *proviso* authorize the construction of a ditch or canal across the mining claim of another, whatever may be its effect in respect to "settlers" on agricultural lands of the United States.

Judgment and order affirmed.

Mr. Justice RHODES expressed no opinion.

GOOCH ET AL. v. SULLIVAN ET AL.

(13 Nevada, 78. Supreme Court, 1878.)

Practice in Supreme Court—Objections to evidence. The Supreme Court will only consider objections to evidence upon grounds specified in the court below, and will not reverse a ruling admitting or rejecting evidence upon a ground in no way suggested at the time of objection, and which the court was not called upon to decide.

[1] **Parol license; how proven.** A parol license which, when given and executed, should be upheld and enforced in equity, may be proven by

[1] *Yunker* v. *Nichols*, 1 Colo. 551; *Post* IRRIGATION; *Fabian* v. *Collins*, 5 M. R. 20.

parol *e. g.*, a license to use a ditch for conveying water across another's land.

Ditch across lands of both parties for mutual accommodation—Executed parol license. Plaintiffs and defendants constructed a ditch from the tail-race of the Nevada Land and Mining Company, across the lands of the defendants and plaintiffs respectively, for their joint use in the conveyance of such quantity of water as each of them might purchase from the said company; the defendants diverted the water and deprived plaintiff of its use: *Held*, that these facts established an executed parol license in favor of the plaintiffs, which supplied the place of a writing and took the case out of the Statute of Frauds, and entitled them to an interest in said ditch and to damages for the diversion of the water.

Appeal from the District Court of Washoe County, Second Judicial District.

WILLIAM CAIN, for appellants, who were plaintiffs below.

THOS. E. HAYDON and W. M. BOARDMAN, for respondents.

By the Court: LEONARD, J.

This case is, in many respects, like *Lee et al.* v. *McLeod*, 12 Nev. 280. Plaintiffs seek to recover an undivided seven sixteenths part of a certain water ditch described in their complaint, alleged to have been constructed from a tail-race of the Nevada Land and Mining Company over the lands of plaintiffs and defendants, for the purpose of conducting water from said tail-race to and upon the land of defendants and plaintiffs respectively, a distance of four or five miles, for farming and irrigating purposes. Plaintiffs also ask that defendants be perpetually enjoined from interfering with plaintiffs' free and undisturbed use of said ditch to the extent of their interest therein, and that plaintiffs have judgment for damages in the sum of one thousand five hundred dollars, on account of an unlawful diversion of the waters of said ditch, on and after May 20, 1876, until the twelfth day of August, 1876, when this action was commenced. Defendants were enjoined from interfering with plaintiffs' alleged rights in said water ditch; also from diverting therefrom any portion of one hundred and forty-five inches of water, claimed to have been purchased from said Nevada Land and Mining Company for the irrigating season of 1876 by plaintiffs.

Defendants answered separately, and denied all the allegations of the complaint that are material on this appeal, except the allegation "that the ditch in question was constructed and used for the purpose of conducting water from said tail-race to the lands of plaintiffs and defendants, for farming and irrigating purposes, and is capable of conducting from five to six hundred inches of water." Defendants also admitted, by failing to deny the same, that plaintiffs purchased the use of one hundred and forty-five inches of water from the Nevada Land and Mining Company, to be conducted through said ditch and used for irrigating purposes upon their ranches on and after July 4, 1876, during the farming season of that year; and further, that they, the defendants, diverted the water claimed by plaintiffs, but they denied plaintiffs' alleged right and title to the ditch or any of the water therein.

It was agreed by counsel upon the trial, and so ordered by the court, that plaintiffs might offer all evidence which they had or could procure to maintain or establish the right claimed by them, subject to defendants' objection, that such rights could be established only by deed or proper instrument in writing, vesting the same in plaintiffs or their grantors; that all evidence offered by plaintiffs, except such written evidence, should be taken under such objection, and the court should decide upon the same after plaintiffs should rest their case. Thereupon plaintiffs introduced evidence tending to establish these facts: That plaintiffs and defendants respectively own and cultivate ranches near the town of Reno, through and over which the ditch in question was constructed by defendants' and plaintiffs' grantors in the year 1868 or thereabouts, for the purpose of conducting to their lands for irrigating purposes waters running through the tail-race above mentioned, and belonging to the Nevada Land and Mining Company; that defendants' and plaintiffs' grantors, in 1868, agreed to construct and own the ditch together, for the purposes stated, and when it should be completed, to keep it in repair, defendants to own one fourth each, and plaintiffs' grantors one fourth each; that each of the parties to the agreement contributed his proportion of the labor and expenses necessary for its completion; that defendants, and plaintiffs, and their grantors, jointly kept it in repair, and until about May

20, 1876, used the same in common, according to their respective interests, without further permission or consent from the others; that the ditch is from four to five miles in length, and capable of conducting from five to six hundred inches of water; that defendants, prior to the date last mentioned, did not claim but an undivided one fourth interest each, and recognized plaintiffs' right to the balance; that in the year 1876 plaintiffs required water for use upon their respective ranches in their proper cultivation, and that in the spring of said year they purchased one hundred and forty-five inches of water, to be taken from the tail-race and used upon their lands for irrigating purposes during the irrigating season; that defendants deprived plaintiffs of the use of a great portion of the water so purchased by them, and thereby greatly injured their crops.

After plaintiffs had rested their case, defendants' counsel moved for a judgment of nonsuit upon the ground that the right claimed by plaintiffs, and by them sought to be enforced, was an estate or interest in the lands of defendants, other than a lease thereof, for a term not exceeding one year, and that the same was not created, granted, assigned, surrendered or declared by act or operation of law, or by deed or conveyance in writing, subscribed by the defendants or either of them, or by their lawful agents, etc. The motion was granted, and this appeal is taken from the judgment of nonsuit.

It is urged that, by their agreement and acts, respondents are estopped from denying appellants' alleged rights in the ditch in question. In answer to this, counsel for respondents reply that the facts necessary to constitute an equitable estoppel must be pleaded; that they are not in any manner stated in the complaint in this case, and consequently that appellants can not invoke the principle claimed. We need not inquire whether it was necessary for appellants to plead such facts or not, for the reason that the only ground of objection to appellants' evidence was the one above stated. It was not objected that the evidence was inadmissible because the facts constituting an equitable estoppel were not pleaded. In *Sharon* v. *Minnock*, 6 Nev. 383, the court held that the ground of objection must be stated in the court below, and that this court would not reverse a ruling admitting

or rejecting evidence upon a ground in no way suggested at the time of objection, and upon which the court was not called upon to decide; that this court would consider objections only upon the grounds specified in the court below. Such a construction was evidently intended by the legislature, and is the only one that is just to courts and litigants. That parol evidence is admissible in general, to prove such an executed parol license as should be enforced in equity, requires no argument or citation of authorities. Any parol license which, if given and executed, will be upheld and enforced in equity, may be proven by parol. The fact that the license was in parol, excludes, as a rule, the possibility of proving it by evidence in writing.

The question for our consideration, then, is: Did the facts admitted in the pleadings and proven on the trial, the same being uncontradicted, entitle appellants to any relief sought in the court below? We think they did. They tended, at least, to establish an executed parol license in favor of appellants, which supplied the place of a writing and took the case out of the Statute of Frauds. The facts admitted and proven, if true, show that for the mutual benefit of respondents' and appellants' grantors, an agreement was by them entered into, jointly to construct the ditch in question for a common purpose; that in pursuance of such agreement and by reason thereof, they performed their proportion of labor and advanced their share of the expenditure necessary in its construction, and that subsequently appellants and their grantors contributed their share of labor and expense necessary in keeping it in proper condition for use; that at the time appellants were deprived of the water they had the right to use one hundred and forty-five inches from the tail-race mentioned during the whole irrigating season; that water was indispensable to the growth and maturity of their crops, and that by reason of its diversion their crops were injured; that appellants and their grantors, from 1868 until 1876, uninterruptedly used said ditch in proportion to the interests claimed by them respectively, and that during such period respondents did not claim but a fourth interest each therein. If the facts stated are true, respondents had no right to deprive appellants of the use of the ditch to the extent of their interest, at least so long as the

latter were able to purchase water from the owner of the said tail-race, and so long as they did so purchase it to be used upon their lands for irrigating purposes. See *Lee et al.* v. *McLeod*, 12 Nev. 280, and the cases therein cited.

In *Raritan Water Power Co.* v. *Veghte*, 21 N. J. Eq. 463, the court say: "Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the Statute of Frauds; and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

It is said by counsel for respondents that the ditch was intended for temporary purposes only. The evidence certainly does not show that such was the intention, and we can not presume it to have been so from the character of the property and the surroundings of the parties. It is true the tail-race is not a natural stream, and that all the parties were obliged to purchase the water from its owner. But surely these facts did not justify respondents in depriving appellants of the use of the ditch so long as they were able to secure the water by purchase or otherwise.

We do not deem it important to consider other points raised by counsel for appellants.

The appellants will, if they so desire, be allowed, upon proper motion, to amend their complaint in such a manner that the case may be tried upon its merits.

The judgment of the district court is reversed and a new trial ordered.

FABIAN ET AL., Respondents, v. COLLINS ET AL., Appellants.

(3 Montana, 215. Supreme Court, 1878.)

[1] **Injunction against diversion.** In a suit for the diversion of water, and praying for a perpetual injunction against its diversion, the defendants contended that the plaintiffs were not entitled to equitable relief, and that an action of ejectment would afford a legal remedy: *Held*, that the relief prayed for was appropriate to the case stated in the complaint.

[2] **Jury trials in equitable proceedings.** In such a suit the remedy sought being equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment.

[3] **Oral license to use water valid, but not assignable.** A personal license for the diversion of water from Ottawa gulch to Jenny's basin during the time that the licensors do not require the same in the gulch is not a conveyance of an interest in lands, and is valid, although not reduced to writing and recorded. Such license should be limited strictly to the original parties, and can not be sold or transferred to others.

[4] **Licensees are estopped from disputing the prior rights of the licensors,** and if third parties purchase such license, and enter into possession, their appropriation will only date from such possession.

Equitable estoppel defectively pleaded—Waiver. In a suit for the diversion of water the answer set up that the right of the plaintiffs' grantors to the water was under an oral license from the defendants, which was subject to their right to use the water at all times. The replication alleged that defendants were estopped from setting up any such agreement because they were present at the time of the plaintiffs' purchase, and failed to notify them of such agreement: *Held*, that the replication fails to set forth all the facts which constitute an equitable estoppel, for it does not appear therefrom that the plaintiffs have been injured by any intended deception or fraud of defendants, but also, *held*, that the defendants had waived the defect in pleading by failure to except to the replication, and by allowing evidence to be produced on the trial the same as though the estoppel had been properly pleaded.

Practice in Montana—Special findings. Under the Practice Act of Montana, when there is no special finding upon an issue presented by the pleadings, but the decree recites that the equities are with plaint-

[1] *Barkley* v. *Tieleke*, 4 M. R. 664.

[2] *McGan* v. *O'Neil*, 5 Colo. 58.

[3] As to parol license see *Gooch* v. *Sullivan*, 5 M. R. 12; as to assignment, see *Kamphouse* v. *Gaffner*, 2 M. R. 258.

[4] *Barkley* v. *Tieleke*, 4 M. R. 664.

iffs, it will be presumed that the court found the issue for the party for whom judgment is rendered.

[1] **Draftsman of deed estopped from claiming title to the premises conveyed.** Plaintiffs purchased certain water rights of parties whose claims were in conflict with defendants', but one of the defendants drew the deed and witnessed it, and the other was present and knew that the sale was going on. Neither of them asserted any claim to the water: *Held*, that they were estopped from afterward asserting any claim to the same adverse to the plaintiffs.

Appeal from the District Court of Lewis and Clarke County, Third Judicial District.

The action was tried before WADE, C. J.

SHOBER & LOWRY and E. W. TOOLE, for appellants, who were defendants below.

WOOLFOLK & PORTER and SANDERS & CULLEN, for respondents.

By the Court: BLAKE, J.

The report of the appeal in this case from the order of the judge dissolving a temporary injunction renders needless a repetition of the facts which are stated in the opinion of the court: 2 Mon. 510. The complaint was filed April 20, 1876, and contained the following allegations: That the plaintiffs [respondents] and their grantors and predecessors in interest on and before April 19, 1876, were the owners of the Fabian water ditch, which had been constructed for the purpose of conveying all the water of Silver creek flowing in Ottawá gulch upon placer mines of plaintiffs in Jenny's basin on Jenny's fork; that they appropriated the water by means of this ditch from the date of its construction and thereby acquired a prior right to the use thereof; that while they were in the peaceable possession of the water, the defendants [appellants] wrongfully diverted the same from the Fabian ditch, by means of another ditch, which intersected Silver creek at a point above the head of plaintiffs' ditch; that the defendants have continued to divert this water, and threaten to continue

[1] *Golden Terra Co.* v. *Mahler*, 4 M. R. 390.

to so divert the same to the great and irreparable injury of the plaintiffs; and that the plaintiffs will be wholly deprived of the use of the water unless the defendants are enjoined from so diverting the same. The prayer of the complaint is for a preliminary injunction, and also that the injunction be made perpetual upon the final hearing.

The answer denies specifically the allegations in the complaint, and alleges that Ottawa gulch was located and recorded October 4, 1864, as mineral land, and the water flowing therein, which includes that claimed by the plaintiffs, was appropriated for the use of the miners in the gulch; that the defendants have been working on their placer ground in this gulch and using the water since July 20, 1866; that long after this use and appropriation of the water by the defendants, certain parties, J. C. Loyd and others, owned placer claims in Jenny's basin on Jenny's fork of Ottawa gulch and recognized the rights of the defendants to the water; that said Loyd and others entered into an agreement with the defendants and other miners of Ottawa gulch that they would permit the water to flow down the gulch whenever the defendants and other miners wished to use the same, if the defendants and other miners would allow Loyd and others to convey the water to Jenny's basin; that Loyd and others then dug the ditch, which is claimed by the plaintiffs under the agreement, and were not to have any right to the use of the water as against the defendants and other miners in Ottawa gulch; that this was a personal license in favor of Loyd and others, who are the owners of the Fabian ditch, and that the ground in Jenny's fork, on which Loyd and others had the license to use the water, has been wholly worked out; and that the defendants require the water to mine their placer ground in Ottawa gulch, and committed the injuries complained of by the plaintiffs in constructing a reservoir in the gulch above the mouth of Jenny's fork.

The replication denies every allegation in the answer and alleges that the defendants are estopped from asserting the agreement "for the reason that said defendants were present at the time and date of the purchase by plaintiffs of said ditch and water right from their grantors, and did not notify these plaintiffs of the existence of any such agreement;" that the

plaintiffs had no notice of this agreement at the date of their purchase; and that the mining ground in Ottawa gulch above the mouth of Jenny's fork remained vacant for a long period after the Fabian ditch had been constructed and the water had been appropriated by the grantors of the plaintiffs.

At the trial, sixteen special findings were submitted to the jury and the following facts were established by the verdict thereon: 1. That the defendants or their grantors appropriated the water of Ottawa gulch prior to the time that Loyd and others constructed their ditch from this gulch to Jenny's basin. 2. That the parties who constructed the Fabian ditch made the agreement with the defendants and other miners, which is contained in the answer. 3. That the plaintiffs did not have any notice of this agreement when they purchased the ditch of Loyd and others. 4. That the plaintiffs were first notified of this agreement in the summer of 1874. 5. That Loyd and others and the defendants and others were the parties to this agreement. 6. That it was under this agreement that the parties who constructed the Fabian ditch were permitted to use the water of Ottawa gulch through their ditch. 7. That the parties to the agreement owned, at the time it was made, claims numbered from thirty to thirty-seven inclusive in Ottawa gulch, and that other miners then owned claims numbered from thirty-eight to forty-one inclusive; that claims numbered from thirty to thirty-nine were below the junction of Jenny's fork with the gulch, and the claims numbered forty and forty-one were at and above the junction. 8. That the defendants were owners of claims in the gulch, and mining there at and before the construction of the plaintiffs' ditch, and that the defendants are miners and claim owners in the gulch, and the water of the gulch is necessary to mine successfully their ground. 9. That the defendants have mined their claims in this gulch since 1866. 10. That the plaintiffs hold and own their ditch by purchase from the original owners and constructors. 11. That it is necessary to reservoir the water in Ottawa gulch to work successfully the claims therein. 12. That a reservoir could be constructed at the junction of Jenny's fork with Ottawa gulch. 13. That a reservoir so constructed would not enable the miners to work out all claims that were owned by the parties to the agreement

at the time it was made. 14. That this agreement was verbal. 15. That the water of Ottawa gulch was used at the time of the sale of the mining claims in Jenny's basin by Loyd and others to the plaintiffs, and that this water was necessary to mine the claims. 16. That the defendants, before the commencement of this action, diverted the water of Ottawa gulch from plaintiffs' ditch.

No exceptions were taken to the findings of the jury, and each party moved for judgment upon the pleadings, evidence and findings. The court rendered a decree that the preliminary injunction be made perpetual, but reserved for the defendants the right to take the water flowing through plaintiffs' ditch below the mining ground of the plaintiffs in Jenny's basin. The preliminary injunction restrained the defendants from diverting from the plaintiffs' ditch the water flowing down Ottawa gulch.

The appellants claim that the respondents can not obtain equitable relief under the pleadings, and that an action in the nature of ejectment would afford a legal remedy. The following cases are cited in support of this position: *Lewis* v. *Cocks*, 23 Wall. 466; *Raffetto* v. *Fiori*, 50 Cal. 363; *Felton* v. *Justice*, 51 Id. 529. In *Lewis* v. *Cocks*, *supra*, Cocks filed a bill in equity praying that the defendant might be decreed to execute a deed for two houses and lots on receiving the price paid for the same by the defendant. The court held that there was no fraud in the case, or any other matter which is specially the subject of equitable jurisdiction; that the bill was not the proper means to recover the possession of land of which Cocks was out of possession; and that "an action of ejectment is an adequate remedy." In *Raffetto* v. *Fiori*, *supra*, an action of trespass was brought in May, 1873, to recover damages and obtain an injunction, and it was one of the findings that the defendants had been in the possession of the land since August, 1870. The court held that this action could not be maintained where the plaintiff is actually disseized of the land and the defendant is in the adverse possession thereof. In *Felton* v. *Justice*, *supra*, the complaint alleged that the defendants forcibly ousted the plaintiffs from the possession of the plaintiffs' ditch, on the plaintiffs' rancho, and converted to their use the water flowing therein, and

threatened to continue the trespass. The court approved the case of *Raffeto* v. *Fiori*, *supra*, and held that a court of equity will not restrain the commission of threatened trespasses by the defendants, who are in the adverse possession of land, when the plaintiffs are totally disseized.

In the case at bar, the appellants did not disturb the respondents in the possession of the Fabian ditch, but diverted the water which was an incident to the ditch. We are aware of some rules which are applicable alike to land and water, and that, in a legal sense, property in a water course is comprehended under the general name of land, and that a grant of land conveys to the grantee the water which flows naturally over the surface. But we have not seen any case in which the doctrine of the foregoing decisions, relating to the remedy for the recovery of the possession of land, has been applied to a controversy respecting the prior right to the use of water. On the contrary, many judgments in the courts of the States and Territories in which the work of mining for the precious metals is pursued under the same conditions which exist in this Territory, have been entered and affirmed in actions in which the complaint was in substance the same as that under consideration, and the equitable relief of an injunction has been granted in favor of a party who was not in the possession of the water when the suit was commenced.

The appellant insists that the Supreme Court of California, in the case of *Felton* v. *Justice*, *supra*, recognized the rule that the law which governs the right to the possession of land applies also to the right to the use of water. This is not our view of the principle which is upheld in the opinion in which the court says: "The purpose of this action is to enjoin the commission of trespasses upon lands alleged to be the property of plaintiffs. The plaintiffs allege that the defendant had entered upon the lands, and ousted and removed plaintiffs therefrom." We think that the court, in using the term "lands," referred to the rancho and ditch thereon, and did not include the water right. It must be admitted that the brevity of the opinion on this point makes its meaning a fair subject of criticism, and we may have misunderstood the case. Conceding that the appellants are correct in their interpretation of this decision, we are satisfied, by an examination of the au-

thorities, that the complaint of the respondents states a good cause of action and prays for appropriate relief.

Mr. Yale in considering remedies for the diversion of water says: "Actions for injuries to water rights are threefold: 1. By an action for damages in using or diverting the water, which sounds only in damages, or in assumpsit for so much water used, under a contract, expressed or implied. 2. By an action for a perpetual injunction to restrain the further use of the water, upon the ground of irreparable injury. 3. By an action in the nature of a proceeding to abate a nuisance, when an impediment or obstruction has been created to prevent the flow of water in its natural course. The cases in our courts furnish numerous instances of actions of each description. * * * The injunction is but a provisional remedy, and but an incident to the action, or it may be the sole purpose of the bill": Yale on Mining Claims and Water Rights, 213. This commentator has defined clearly the law upon this subject. In a majority of the cases that we have examined, the aggrieved party asks for damages and an injunction, but the allegations of the facts which are essential to secure the equitable relief are similar to those of the complaint in this case. The omission or denial of the prayer for damages does not affect the right to an injunction. In *Tuolumne W. Co.* v. *Chapman*, 8 Cal. 392, the complaint is the same as that of the respondents, and the judgment of the court below in overruling a demurrer thereto is affirmed, and it is held that the "continued diversion of water from a party entitled to it is such an irreparable injury as a court of equity will redress." In *Parke* v. *Kilham*, 8 Cal. 77, it is held that "a ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood the premises." These decisions are based upon the well settled principle that courts of equity will always interfere by injunction when irreparable injury will be caused by the obstruction of a water course or the diversion of water: 2 Story's Eq. Jur., §§ 926, 927; Angell on Water Courses, §§ 444–447. The complaints in the cases of *Wilkins* v. *McCue*, 46 Cal. 656, and *Covington* v. *Becker*, 5 Nev. 281, are the same in substance as that before us, and an injunction is the sole relief that is sought. In *Higgins* v. *Barker*, 42 Cal. 233, the plaint-

iff asked for damages and an injunction, and the court granted the injunction and refused to allow any damages. In *Lake* v. *Tolles*, 8 Nev. 285, the prayer of the complaint was for the title to the use of the water, damages for its past diversion and an injunction, and a decree was entered for the plaintiff and damages in the sum of one cent. The court held that "the complaint was purely equitable * * * save so far as it showed and prayed damage." In *Barnes* v. *Sabron*, 10 Nev. 217, Mr. Chief Justice HAWLEY says: "The rule of law is, that in cases for the diversion of water, where there is a clear violation of a right and equitable relief is prayed for, it is not necessary to show actual damage; every violation of a right imports damage; and this principle is applied wherever the act done is of such a nature as that by its repetition or continuance it may become the foundation of an adverse right." The courts of this Territory have adhered to the rules which have been enforced in the States of California and Nevada: *Caruthers* v. *Pemberton*, 1 Mon. 115; *Harris* v. *Shontz*, Id. 212; *Toombs* v. *Hornbuckle*, Id. 286; *Columbia M. Co.* v. *Holter*, Id. 296; *Gallagher* v. *Basey*, Id. 457; *Barkley* v. *Tieleke*, 2 Id. 59. In *Harris* v. *Shontz*, *supra*, a perpetual injunction was decreed, but no damages were assessed for the diversion of the water. In *Columbia M. Co.* v. *Holter*, *supra*, it was held that the plaintiff was entitled to nominal damages and a perpetual injunction to restrain the defendant from diverting the water. In *Gallagher* v. *Basey*, *supra*, the prayer of the complaint is for an injunction to restrain the defendant from the use of the water, and judgment was entered for the plaintiff. In *Barkley* v. *Tieleke*, *supra*, which was an action involving the prior right to the use of water, Mr. Justice SERVIS says: "The defendants insist that before relief can be had under the claim made by plaintiff, he must resort to an action at law to settle the legal title to the property in question. * * * Upon a review of the authorities, we are satisfied that chancery is a well defined remedy for relief in an action in the nature of a nuisance, of which this clearly partakes, without resort to an action at law. In fact, equity seems to be the only appropriate remedy to afford relief in cases like the one under consideration." The case of *Atchison* v. *Peterson*, 1 Mon. 561, was appealed to the

Supreme Court of the United States, and Mr. Justice FIELD, in delivering the opinion affirming the judgment, says: "In all controversies, therefore, between him (the first appropriator) and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction": 20 Wall. 515.

The appellants contend that they have been deprived of a trial by a jury of the right to the use of the water in controversy, and that the court below erred in submitting only the findings that it deemed proper, and basing its decree thereon. The conclusions that we have announced regarding the sufficiency of the complaint, the equitable character of this action and the remedy of the respondents, determine these objections. This is a case in equity in which a jury trial can not be claimed as a right by the parties: *Kleinschmidt* v. *Dunphy*, 1 Mon. 118. In *Lake* v. *Tolles*, *infra*, the ruling of the court below in refusing to try the issues by a jury was affirmed. The case of *Gallagher* v. *Basey*, *supra*, in which the court disregarded some of the special findings of the jury in rendering its decree, was appealed to the Supreme Court of the United States, and Mr. Justice FIELD, in the opinion affirming the judgment of this court, says: "If the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. * * * Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury

would be required; but upon the propriety of an injunction, the action of the court alone could be invoked": 20 Wall. 680.

The next matter for our consideration is the effect of the agreement, which is referred to in the pleadings and findings, upon the rights of the appellants and respondents. Loyd and the other persons who constructed the Fabian ditch and were the grantors and predecessors in interest of the respondents, had the personal license of diverting and using the water of Ottawa gulch upon their mining claims in Jenny's basin during the time that the appellants and other miners did not need the same for the working of their ground in Ottawa gulch. No interest in land was thereby conveyed or created, and the agreement was valid between the parties, although it was not reduced to writing and put upon the records of the mining district of the proper county. Afterward, Loyd and his partners expended money and labor in digging their ditch and making other improvements which were necessary to mine their property in Jenny's basin. By asking for and obtaining the privilege of using the water in controversy for this particular purpose under the foregoing conditions, Loyd and his associates recognized the prior appropriation thereof by the appellants. The legal relations of the parties were the same as those of landlord and tenant. The doctrine of the tenant's estoppel would prevail against Loyd and his company, when they were in the possession of the water under the license, and the prior rights of the appellants could not be disputed: Bigelow on Estoppel, 2d ed., 359, 381, and cases there cited. But this privilege, which was acquired under the license or agreement, was limited strictly to the original parties, and could not be sold and transferred to the respondents by Loyd and the other licensees: 2 Am. L. C., 4th ed., 736, and cases there cited; Washb. on Ease., 2d ed., 8; Browne on Statute of Frauds, 2d ed., § 22; *Babcock* v. *Utter*, 32 How. Pr. 439.

It appears that the water has been used upon the mines in Jenny's basin since 1867, without injury to the claim holders of Ottawa gulch, until the appellants were working at a point which made necessary the construction of the reservoir that is mentioned in the answer, and this action was com-

menced. The respondents maintain that their grantors appropriated the water when the Fabian ditch was located and surveyed, but we think that the appropriation by the respondents must date from the time when they took possession of the ditch in 1872: *Smith* v. *O'Hara*, 43 Cal. 371. The appellants were the prior appropriators of the water, and their interests could not be destroyed or forfeited by the omission to make a record of the agreement, or the ignorance of the respondents concerning it when they bought the property of Loyd and others. At any time the appellants could revoke this license: 1 Washb. Real Prop. 400, and cases there cited; *Babcock* v. *Utter*, *supra;* Washb. on Easements, 2d ed., 23, and cases there cited.

The following question is decisive of this case: Are the appellants estopped from claiming the water of Ottawa gulch, as against the respondents, by their conduct at the time when three deeds were executed and delivered by Loyd, Moss and Riley to the respondents? The appellants are correct in their position that the replication fails to set forth all the facts which constitute an equitable estoppel. It does not allege that the respondents were influenced in buying the property of Loyd, Moss and Riley by the conduct of the appellants, or that the respondents had no convenient means of acquiring knowledge of the true state of the title to the water of Ottawa gulch. It therefore does not appear from this pleading that the respondents have been injured by any intended deception in the conduct of the appellants, or gross negligence on their part, which amounts to constructive fraud: 1 Story's Eq. Jur., 9th ed., § 391, and cases there cited; *Brant* v. *Virginia C. & I. Co.*, 93 U. S. 326, and cases there cited; *Sharon* v. *Minnock*, 6 Nev. 377; Bigelow on Estoppel, 2d ed., 437; *Davis* v. *Davis*, 26 Cal. 23. The appellants did not raise this question in the court below, and took no exception to the replication, and allowed evidence to be produced on the trial in the same manner as if the facts constituting the estoppel had been properly pleaded, and thereby waived the defect in the pleading: *Davis* v. *Davis*, *supra.*

The decree states that the equities of the case are in favor of the respondents, and the appellants insist that the judgment can not be supported because there is no special finding

upon the issue of estoppel. The decisions, which are relied on by the appellants, were made under the Code of Civil Procedure of the State of California, which changed the rule relating to implied findings of facts: *Campbell* v. *Buckman*, 49 Cal. 362; *N. P. R. Co.* v. *Reynolds*, 50 Id. 90; *Harris* v. *Burns*, 51 Id. 528. This action must be governed by the Civil Practice Act, approved January 12, 1872, and we must presume, unless the contrary appears, that the court below found on this issue for the party for whom the judgment was entered: *Ming* v. *Truett*, 1 Mon. 322; *Morse* v. *Swan*, 2 Id. 306; *Ervin* v. *Collier*, 3 Mont. 189.

The transcript contains the following evidence upon this point: We omit that which sustains the special findings of the jury. The respondents bought some mining claims in Jenny's basin, and received their deeds from Riley, Moss and Loyd, which were dated respectively, October 10, 1872, October 11, 1872, and September 21, 1873. The deeds described the ground "with the water right and ditches and other appurtenances thereunto belonging to the aforesaid mining ground." Collins, one of the appellants, signed his name as a witness to the execution of the deeds by Riley and Moss, and Mayger, the other appellant, was a witness to the execution of the deed by Loyd, and, as the recorder of the mining district, placed upon the records the deeds from Riley and Moss. The appellants knew that these mining claims could not be worked successfully without the water of Ottawa gulch, and that the Fabian ditch and this water were included in the ditches and water right mentioned in the deeds to the respondents. The deeds were drawn up by Mayger in the presence of Collins, who knew that the sale was being made, and the grantors and respondents consulted with Mayger respecting the contents of the deeds. Neither Collins nor Mayger informed the respondents of any claim by any persons to the water in dispute. Do these facts uphold the implied finding of the court on the issue of estoppel, or does the contrary appear therefrom? Was it the duty of Collins and Mayger to keep silence or to speak out concerning their right to the water of Ottawa gulch when the deeds were executed to the respondents? The respondents could gain no knowledge of the state of the appellants' title by an examination of the

records of the mining district and county in which the property is situated, which is often the convenient means of ascertaining a fact of this kind. The respondents acquired by their purchase the possession of the water, which had been used by their grantors more than five years without interruption, and could presume reasonably that this use had been rightful.

In *Hale* v. *Skinner*, 117 Mass. 474, Mr. Chief Justice GRAY refers to "the doctrine of courts of equity that a person witnessing or present at the execution of a conveyance of property by another is estopped afterward to set up title in himself." Mr. Bigelow, in his work on Estoppel, says: "Thus the witnessing of a deed to one's own land, done knowingly, for a grantee in ignorance of the witness's rights, will, at least in equity, estop the witness to set up against the grantee a claim to the land existing in the witness when the deed was executed": Bigelow on Estoppel, 2d ed., 451, 471, and cases there cited. Mr. Story says in his Commentaries on Equity and Jurisprudence: "In many cases a man may innocently be silent. * * * But in other cases a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. * * * So, if a man should stand by and see another person, as grantor, execute a deed of conveyance of land belonging to himself, and, knowing the facts, should sign his name as a witness, he would in equity be bound by the conveyance:" Story's Eq. Jur., 9th ed., § 385. In *Gregg* v. *Von Phul*, 1 Wall. 274, Mr. Justice DAVIS says: "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate to be sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterward to assert his claim against the purchaser. And justly so, because the effect of his silence has actually misled and worked harm to the purchaser." We might cite other authorities in support of these propositions: 1 Greenl. on Ev., 12th ed., § 207; Angell on Water Courses, 6th ed., § 328; *Chapman* v. *Chapman*, 59 Penn. St. 214; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 354; *Niven* v. *Belknap*, 2 Johns. L. 573; *Brown* v. *Bowen*, 30 N. Y. 520; *Henshaw* v. *Bissell*, 18 Wall. 255.

The application of these principles to the facts before us, compels us to conclude that the appellants should have asserted their claim to the water of Ottawa gulch when the deeds were executed by Moss, Riley and Loyd; and that their conduct and silence at that time estop them from speaking in this action against the respondents. The respondents could not buy from their grantors any title under the parol license conferred by the appellants, and were induced to pay Moss, Riley and Loyd for what they did not own. The appellants acted with a full knowledge of their rights, when the respondents were in ignorance regarding them, and without convenient means of acquiring information.

The judgment protects with a just discrimination the rights of the parties, and is affirmed with costs.

Judgment affirmed.

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[1]BRODER v. NATOMA WATER CO.

(101 United States, 274. Supreme Court 1879.)

Government patents granted subject to vested water rights—R. R. grants. The N. Water and Mining Co. was the owner of a ditch in California which it had constructed on the public land in 1853 and its right of way and use of the water was recognized uniformly by the local customs, laws and decisions of the courts of that State. B. acquired title to certain land through which the ditch ran by pre-emption made after the passage of the act of July 26, 1866, which declares that certain water rights shall be protected. B. also acquired title to another portion under the grant made to the Central Pacific Railroad Company by the amended Pacific Railroad Act of July 2, 1864. B. thereupon brought suit against the N. Co. for damages and sought to have the ditch abated as a nuisance: *Held*, that as to the land acquired by pre-emption, B's title was subsequent to the act of 1866 and he took subject to the right of way of the N. Co.; and as to the other, although the grant to the railroad was prior to the act of 1866, yet that act was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. Moreover the grant to the railroad expressly declared that it should not defeat or impair any lawful claim which would include such a claim as that of the N. Co.

S. C. below, 4 M. R. 670

Error to the Supreme Court of the State of California.

The facts of the case and the legislation bearing upon them are set out in the opinion of the court.

JOHN H. MCKUNE, for the plaintiff in error.

A. P. CATLIN, S. SHELLABARGER and J. M. WILSON, *contra.*

MILLER, J.

The Natoma Water and Mining Company owns a canal for conducting water and distributing the same for mining, agricultural and other uses, which is some fifteen miles long. It was completed in the year 1853, and since then has been in constant and successful operation under the control and in the possession of the company. Its cost was about $200,000. The court of the first instance on the trial of this cause found also as a fact that the canal and branches have, ever since their construction, been uniformly acknowledged and recognized by the local customs, laws and the decisions of the courts of the State of California, in which they lie, and that the land covered by them is indispensable to their use. At the time they were finished, and for many years after, in fact up to the passage of the Pacific Railroad Acts of 1862 and 1864, the land through which they ran was the public property of the United States. A portion of it is included in the grant made by that act to what has since, by change of name and consolidation of corporate franchises, become the Central Pacific Railroad Company, and the plaintiff in error, by proper conveyance from said company, has become the owner of it. A small part of it is traversed by the canal, and he brought this action in the proper court of that State against said water and mining company, to have the canal declared a nuisance and abated, and to recover $12,000 damages on account of maintenance on his land. The case was submitted to the court, which found the facts we have stated, and others that will be referred to.

The inception of the title of plaintiff to the land described in his petition other than that derived from the railroad company, was a declaratory statement for pre-emption, filed Aug.

6, 1866, by himself for one tract, and a similar statement filed Sept. 14, 1866, by his brother, Jacob Broder, for another. But prior to either of these dates, to wit, on the 26th of July of the same year, Congress enacted a law, the purpose of which was to deal with the rights of miners who had theretofore, without objection, and with the tacit encouragement of the United States, discovered, developed, and mined the public lands: 14 Stat. 251. The ninth section of that act contains this declaration: "That wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed": p. 253.

As to the canal of the defendant, so far as it ran at that date through the land of the United States, this act was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and can not now disturb it.

In reference to his lands held under conveyance from the railroad company, it might be a question of some difficulty whether the right was so far vested in that company before the passage of this act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that the defendant is under the necessity of relying on that statute.

It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim

to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, Id. 670; *Forbes* v. *Gracey*, 94 U. S. 762; *Jennison* v. *Kirk*, 98 Id. 453.

We turn now to the act of July 2, 1864 (13 Stat. 356), which makes the final grant to the Pacific railroad companies, the acceptance of which by the companies bound them to its terms, and we find in Sec. 4, which enlarges the grant of lands made by the act of 1862, this clause of reservation from the general terms of the grant: "Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, *or other lawful claim*, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist": p. 358.

We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection. See *Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Williams* v. *Baker*, 17 Id. 144; *Leavenworth, Lawrence, & Galveston Railroad Co.* v. *United States*, 92 U. S. 733.

In construing the grant to the Pacific railroad companies this principle is eminently applicable. The lands were vastly greater in extent than those embraced in any previous grant, and surrounded by much more varied circumstances. The number and diversified character of the interests which might be affected largely exceeded any with which Congress had theretofore dealt.

Hence we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than

in the reservation clause which had become a formula in previous grants.

Not only are prior reservations made by the government, and rights of pre-emption excepted, but the improvements of *bona fide* settlers on land returned or denominated mineral lands, and the timber necessary to support the miners' improvements, and *any other lawful claim*, are unaffected by the grant. Of course, this means any honest claim evidenced by improvements or other acts of possession.

The defendant had been in possession of the claim in question for twelve years when this act was passed, and had expended $200,000 upon it. It was of great utility, nay necessity, to a large agricultural and mining interest, and we can not doubt that it was of the class which this section declared should not be defeated by the grant which Congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is

Affirmed.

OSGOOD v. THE EL DORADO WATER AND DEEP GRAVEL MINING COMPANY.

(56 California, 571. Supreme Court, 1880.)

[1] **Conflicting rights of appropriator of water and patentee of land.** In a suit for the diversion of the water of a stream which flowed through land which the plaintiff had occupied since 1863, and for which he obtained a patent from the United States in 1871, it appeared that the defendant's grantors had appropriated the water of Echo lake, the source of the stream, for a canal as early as 1860, but that the principal part of the work of constructing the canal was done after 1868: *Held*, that the right of the plaintiff as riparian proprietor attached only after the patent issued, and did not relate to the date of his settlement, or the filing of his declaratory statement, and that such rights were subject to the rights of the prior appropriator of the water.

[2] **Liberal construction.** Notices of the appropriation of water are to be liberally construed.

[2] **Second notice of appropriation no abandonment of first.** The appro-

[1] *Barnes* v. *Sabron*, 4 M. R. 673; *Broder* v. *Natoma Co.*, 5 M. R. 32.

[2] *Weill* v. *Lucerne Co.*, 3 M. R. 372.

priator of the water of a lake or stream, who posts a second notice of appropriation after the passage of the Act of Congress of 1866, which recognized the principle of prior appropriation, does not thereby abandon his first appropriation. Such posting is an *assertion* of the claim.

[1] **Relation as applied to appropriation of water.** The question whether a person has made a valid appropriation of water depends on the questions whether he has given proper notice of his intention to appropriate it, and whether he has prosecuted the work in that behalf with reasonable diligence. If he has done both of these, his rights on the completion of the work relate back to its commencement.

Appeal from a judgment for the defendant, and from an order denying a motion for a new trial, in the Eleventh District Court, County of El Dorado. WHEELER, J.

T. B. MCFARLAND, for appellant.

GEORGE J. BLANCHARD, and GARBER, THORNTON & BISHOP, for respondent.

By the Court: ROSS, J.

It appears from the record that, in the year 1856, a man by the name of Kirk conceived the idea of constructing a canal from the vicinity of Placerville, in El Dorado county, for the purpose of conducting water from various sources of supply in the Sierra Nevada Mountains to the foot-hills and plains below, for mining, agricultural and other useful purposes. There were many obstacles in the way of the undertaking; for the country through which the waters had to be conducted was in great part rough and mountainous, and the winters so severe that the working season consisted of some five months only. According to Kirk's testimony he made, in 1856, a survey for the canal, and also a survey of Silver lake, Clear lake, and Silver creek, posted notices claiming their waters, and did other work, all at a cost of about $1,000. In 1858 he ran the lines over with a party of engineers from "Coon Hollow," a point about three quarters of a mile south of Placerville to the mouth of Alder creek, on the American river, stuck a stake every chain, cut the brush out, made benches about every half mile, and located a reservoir site about seven miles above "Coon Hollow." Rain and snow then coming on, further work

[1] *Sieber* v. *Frink*, 7 Colo. —.

was postponed. The line so run was about sixty miles long, and cost about $1,500. In 1860 Kirk prospected the country for a shorter and better line. He then commenced a bench at the mouth of Alder creek, and ran the line up to Cedar Rock on the American river, where he located a dam, contracted for lumber to construct the flume and gates, employed men to get out timbers for the dam, and had a large pile of drift wood cut out of the river in order to run the water into the head of the ditch. In the same year, 1860, he located, among other lakes, Echo lake, by posting a notice at its outlet, where the present ditch commences, "claiming it as a reservoir to keep the water back to supply this ditch, which is built on this line, located in the year 1860, and also claiming the waters of the lake for the purpose of supplying this present line of ditch;" that is to say, the ditch of the defendant as finally completed, and which was finally located by Kirk in 1860. At that time, 1860, the work consisted of the line from Sportsman's Hall (in the vicinity of Placerville) to Cedar Rock, from the latter point to Silver lake, and thence to Clear lake; and from Cedar Rock up the American river to Audrian's lake, Echo lake, and Slippery Ford lake. After the passage of the act of Congress of July 26, 1866, to wit, in February or March, 1867, Kirk posted at Echo lake a notice, of which the following is a copy:

"In conformity with an act of Congress entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July, 1866, the undersigned hereby claim, and are by priority of possession entitled to, the use of the water of this stream for mining, manufacturing, agricultural and other purposes, and intend to dam said stream, and carry the same or a portion thereof in a flume, ditch or canal, or by natural channels wherever found suitable, to certain mining and agricultural districts, and that the construction of said flume or ditch will not injure any settler on the public domain. "J. KIRK.

"February, 1867. "F. A. BISHOP."

Prior to the posting of this last mentioned notice, which was a printed one, Kirk had conveyed one half of his interest in all the works and waters to Bishop. In 1868 he (Kirk) worked on the lower end of the canal, and on the upper end of it in 1870. In July, 1871, he completed the dam at Cedar Rock,

and turned into the head of the ditch all the water there was in the river. The same year, 1871, he had men at work digging the ditch at Sportsman's Hall, three or four miles of which were dug that and the next year. He worked on the canal every season from 1868 until the defendant's purchase of the canal, works and water rights, which was in September, 1873. From 1869 to July, 1871, he expended over $10,000 in the construction of the canal, and from 1868 to the time of the sale to the defendant in 1873, he and Bishop expended $20,000 in its construction. In the spring of 1871 he put six or eight men at work constructing a dam at Silver lake, and they continued to work on it every season. In April or May, 1872, he posted another notice at the outlet of Echo lake, claiming its waters, and also a like notice at Silver lake, Cedar Rock, and other points. In the spring of 1872 he commenced work on the canal at the outlet of Echo lake, where he put in a small dam, and some men at work grading the ground for a flume, in order to conduct the water of this lake into the American river above the dam of Cedar Rock. This work, as also the work done at Silver lake and Cedar Rock, was a portion of the canal as now completed. The waters of Echo lake were thus taken into the American river, and from that into the main canal at Cedar rock. The line of ditch as now constructed from Echo lake and Silver lake to Sportsman's Hall was first located and determined in 1860. With the exception of the winters and rainy seasons, when it could not be performed, the work was constantly prosecuted from the spring of 1870 until it was completed. The ditch from Cedar Rock to Sportsman's Hall was projected and constructed for the purpose of taking the waters of Echo lake, Silver lake, and the other waters mentioned, and would not have been constructed but for that purpose.

The foregoing is the substance of Kirk's testimony, considered, as we must consider it, in view of the verdict and judgment in defendant's favor, in its most favorable light. In some respects his testimony is supported by other evidence in the case, and in some respects it is not; but the jury and the court below pronounced in its favor, and we must accept it as true.

After the purchase by defendant, work upon the canal and

its branches was vigorously prosecuted, and was completed in the year 1876, at great expense. Upon its completion, the defendant diverted, through and by means of it, the water of Echo lake, except a small portion which was permitted to flow down its natural channel.

For this diversion the plaintiff, on the 3d of August, 1876, commenced the present action to restrain defendant from diverting any of the water of Echo lake, basing his right to the relief sought upon the alleged facts, that he (plaintiff) is the owner in fee of a certain tract of land through which the said water in its natural course flows, and that, as riparian proprietor, he is entitled to the uninterrupted and undiminished flow of the water in its natural course. The evidence on behalf of the plaintiff shows a patent issued to him by the government of the United States, under date of October 25, 1871, which recites that whereas, full payment for the land described has been made by plaintiff, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An Act making further provisions for the sale of the public lands," * * "the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said Nemie Osgood, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Nemie Osgood, and to his heirs and assigns forever."

The land described in the plaintiff's patent is a tract one mile in length and a quarter of a mile in width, and is so located that the water flowing from Echo lake, in its natural course, enters its upper boundary about one mile from the outlet of the lake, and passes through the entire length of the tract, uniting, however, before leaving it, with the waters of the Little Truckee river. The plaintiff first went upon this land in the year 1863, as a toll-gatherer on a certain toll-road. The same year he also commenced raising stock, but the collection of tolls was his principal business. From that date he has resided on the land with his family, except during the winter seasons, which are long, and too severe for a residence

there. When the plaintiff first went upon the land, it was public unsurveyed land of the United States. At the trial, he testified: "The United States surveyor first commenced to survey there in 1865. I filed my declaratory statement in the local United States land office at Sacramento, claiming this land as a pre-emptor, on the 11th day of June, 1868. I proved up and paid for the said land in said office on the 22d day of June, 1870."

On this showing, the plaintiff seeks to invoke the doctrine of relation; but for obvious reasons, no case was made for the application of that doctrine: *Megerle* v. *Ashe*, 33 Cal. 74; *Daniels* v. *Lansdale*, 43 Id. 41; *Smith* v. *Athern*, 34 Id. 506; *Lansdale* v. *Daniels*, 10 Otto (U. S.), 118. The plaintiff's rights must, therefore, be held to have attached on the 25th of October, 1871, the date of the issuance of his patent. But at that date, according to the testimony of Kirk, and of Bishop as well, the grantors of the defendant were in the active prosecution of the work on the canal, for the diversion, among others, of the waters of Echo lake. Whatever may be said upon the question as to whether, all things considered, the defendant's grantors prosecuted the work with reasonable diligence from its inception, we think there can be no doubt that there is evidence in the record tending to show reasonable prosecution of the work, from at least the spring of 1870 until its completion, which testimony the jury by their verdict found to be true. This was a question for the jury, and we can not say that the evidence does not sustain their finding in this respect. The question of notice was also one for the jury. Kirk testified that by the notice posted by him at Echo lake in 1860, he claimed the waters of the lake for the purpose of supplying the ditch as finally located in 1860, and as finally completed by the defendant, and also claimed the lake as a reservoir to hold the water for the purpose of supplying the ditch. According to his testimony, he had also, at that time, surveyed and finally located the line of ditch from Sportsman's Hall to Cedar Rock, and from thence, among other branches, a branch to Echo lake; and the line so surveyed and located was marked by stakes, the blazing of trees, etc. Thereafter he performed, from time to time, work upon the canal at considerable cost,

but whether with sufficient diligence, had other rights intervened, need not be determined. After the passage of the act of Congress of July 26, 1866, the ninth section of which declared that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed," Kirk posted at Echo lake a printed notice, a copy of which has been already inserted in this opinion. This notice was posted by Kirk in 1867, and about the same time he posted a similar notice at the other sources of supply, all of which were at that time claimed by himself and Bishop, the latter having then acquired one half of Kirk's interest.

We discover nothing in the notice of 1867 indicating, on the part of Kirk and Bishop, any intention to abandon their claim to the waters in controversy. The same may be said of the notice posted by them in 1872. The fact of posting the notices was an *assertion* of their claim, not an abandonment; and by all the authorities the notices are to be liberally construed. Leaving out of consideration the notice of 1860, by that of 1867 the plaintiff, or any other inquirer, would have seen that Kirk and Bishop claimed to be entitled to the waters of Echo lake, for mining, manufacturing, agricultural, and other purposes, and that they intended to dam the stream, and take the water, for the purposes mentioned, in a flume, ditch or canal, or by natural channels wherever found suitable. Looking further, he would have seen the proposed ditch staked and marked upon the ground, as finally completed, and through which the water was, in fact, finally diverted. It was for the jury to say whether the testimony introduced on the part of the defendant was true. If true, it was sufficient, in our opinion, to sustain the finding that the grantors of the defendant gave notice of their intention to appropriate the waters of Echo lake: *Kimball* v. *Gearhart*, 12 Cal. 28. This water belonged to the government of the United States, and

was, by the local customs, laws and the decisions of the courts, subject to appropriation for the purposes for which the defendant's grantors sought to appropriate it. And the Supreme Court of the United States, in *Broder* v. *Water Co.*, 11 Otto, 275, declared it to be the established doctrine of that court, "that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect before the passage of the act of 1866;" and the court adds: "We are of opinion that the section of the act which we have quoted (the ninth section) was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."

The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned by the local customs, laws and decisions, was thus expressly recognized and sanctioned by the Supreme Court of the United States, and also by the act of Congress of 1866. And, in keeping with this policy, Congress further provided, in § 17 of the amendatory act approved July 9, 1870 (Copp's Mining Decisions, 1873–74, p. 296,) "that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory," to wit, the act of July 26, 1866.

The defendant's grantors, therefore, had the right to appropriate the water in controversy, and if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant. This of course depends on the question whether the grantors of the defendant made a valid appropriation of the water, and this, in turn, on the

question whether they gave proper notice of their intention to appropriate it, and if so, whether they prosecuted the work in that behalf with reasonable diligence. If they gave sufficient notice, and prosecuted the work with reasonable diligence, there can be no doubt that, on the completion of the work, their rights related back, at least, to the commencement of the work. In this case, the jury found in favor of the defendant on both propositions, and, as observed already, in view of the verdict, we think there is sufficient evidence of notice and of due diligence in the prosecution of the work from a date anterior to the acquiring of any rights by the plaintiff. We think, further, from the whole record, that substantial justice has been done by the jury and the court below between the parties litigant.

The view we have taken of the case renders it unnecessary to consider the other questions which have been elaborately and very ably argued by the learned counsel for the respondent.

Judgment and order affirmed.

MYRICK, J., SHARPSTEIN, J., and MORRISON, C. J., concurred.

McKINSTRY, J., and THORNTON, J., dissented.

1. Irrigating ditch water polluted from quartz mill: *Crane* v. *Winsor*, 2 Utah, 248; *Post* NUISANCE.

2. Partition between ditch owners: *McGillivray* v. *Evans*, 27 Cal. 92; *Post* PARTITION.

3. Relation of joint owners in ditch rights: *Bradley* v. *Harkness*, 26 Cal. 69; *Post* PARTNER; *McConnell* v. *Denver*, 35 Cal. 365; *Post* PARTNER; *Smith* v. *Fagan*, 1 M. R. 87.

4. Degree of care required to prevent overflow: *Campbell* v. *Bear Co.*, 35 Cal. 679; *Post* NEGLIGENCE.

5. Change of use by appropriator: *Woolman* v. *Garringer*, 1 M. R. 675.

6. Change of direction: *Conger* v. *Weaver*, 1 M. R. 594. Change of point of diversion: *Columbia Co.* v. *Holter*, 2 M. R. 14.

7. If a party owns *all* the water of a stream he can enlarge ditch at pleasure: *James* v. *Williams*, 31 Cal. 211.

8. Deed of "right of way" conveys ditch: *Reed* v. *Spicer*, 4 M. R. 330.

9. Parol testimony to explain description of ditch: *Taylor* v. *Holter*, 3 M. R. 322; *Donnell* v. *Humphreys*, 1 Mont. 518.

10. One ditch can not be appurtenant to another ditch: *Donnell* v. *Humphreys*, 1 Mont. 518.

11. A ditch is not an appurtenance to a mining claim: *Quirk* v. *Falk*, 2 M. R. 19.

12. Abandonment of ditch: *Derry* v. *Ross*, 1 M. R. 1.

13. Appropriation relates back to first work: *Woolman* v. *Garringer*, 1 M. R. 675; *Highland Co.* v. *Mumford*, 2 M. R. 3.

14. Notice of intention, without actual appropriation: *Thompson* v. *Lee*, 1 M. R. 610.

15. What constitutes diligence in construction of ditch: *Highland Co.* v. *Mumford*, 2 M. R. 3. And diligence is a question of fact for the jury: *Weaver* v. *Eureka Co.*, 1 M. R. 642.

16. Appropriation by first and second parties during alternate periods: *Smith* v. *O'Hara*, 1 M. R. 671.

17. Extension of flume to prevent appropriation of water from below its tail: *Correa* v. *Frietas*, 2 M. R. 336.

18. Condemnation of right of way: *Cons. Co.* v. *C. P. Co.*, 51 Cal. 269; *Post* EMINENT DOMAIN; *Hobart* v. *Ford*, 6 Nev. 77; *Post* WAY.

19. Injunction to restrain diversion from ditch: *Burnett* v. *Whitesides*, 13 Cal. 157; *Post* INJUNCTION; *Higgins* v. *Barker*, 42 Cal. 233; *Post* INJUNCTION: *Derry* v. *Ross*, 1 M. R. 1.

20. Judgment in action to enjoin the destruction of a ditch: *Gregory* v. *Nelson*, 41 Cal. 278; *Post* PRACTICE.

21. Action to quiet ditch title: *Head* v. *Fordyce*, 17 Cal. 149; *Post* QUIETING TITLE.

22. Sufficiency of complaint in action for injuries from ditch: *Tuolumne Co.* v. *Columbia Co.*, 10 Cal. 194; *Post* NEGLIGENCE.

23. Complaint in action for diversion: *Leigh Co.* v. *Independent Co.*, 8 Cal. 323; *Post* PLEADING. Answer, in same: *Feely* v. *Shirley*, 43 Cal. 369; *Post* PLEADING. Findings of court in same: *Watson* v. *Cornell*, 52 Cal. 91; *James* v. *Williams*, 31 Cal. 211.

24. Measure of damages for digging ditch on plaintiff's land: *DeCosta* v. *Mass. Co.*, 17 Cal. 613; *Post* MEASURE OF DAMAGES.

25. Damage caused by tapping swollen ditch during flood: *Turner* v. *Tuolumne Co.*, 1 M. R. 107.

26. Mill owners and miners have equal rights to appropriate water: *Ortman* v. *Dixon*, 13 Cal. 34.

27. Sale of ditch and proceeds construed as mortgage: *Kidd* v. *Teeple*, 22 Cal. 255.

See FLUME.

28. Water covenants running with the land: *Weill* v. *Baldwin*, 1 West C. R. 551.

29. The California "Debris Case": *Woodruff* v. *North Bloomfield Co.*, Id. 183.

STOUGHTON v. LEIGH.

(1 Taunt. 402. Common Pleas, 49 Geo. III.)

Dower in open mines. Dower is due out of mines wrought during coverture, whether by the husband or by lessees, and whether he own the whole land or only the minerals.

In unopened mines. But dower is not due out of unopened mines.

Work for sole use. Dowager may work any open mine on land assigned to her, for her own benefit.

How assigned. Dower may be assigned of mines, either separately, or collectively with other lands, by metes and bounds if practicable, otherwise by a proportion of the profits, in sundry ways.

Excessive dower. The heir of full age assigning excessive dower has no relief; otherwise as to the act of an infant, or dower assigned by the sheriff.

This was a case directed out of the High Court of Chancery for the opinion of this court. The facts were in substance as follow:

John Hanbury was, in his life-time and during his marriage and at his death, actually seized of divers landed estates, and of several mines and strata of lead and coal: namely, in his own land, a lead mine and a coal mine, neither opened, wrought or demised; two lead mines and two coal mines which, during the coverture, he had demised to tenants for years, reserving pecuniary rents, to be paid whether they did or did not open and work them; and of each sort of these, one had been opened before his death by the tenant who still continued now to work it, and the other had not been opened; a lead mine and a coal mine which he had demised during the coverture to tenants for years, rendering not pecuniary rents, but quantities of the lead ore and coal when gotten, and the tenants were by the terms of their leases at liberty to work or not to work these mines; the coal mine was at the time of John Hanbury's death and of this suit, wrought by the tenant; the lead mine had not been opened; and two lead mines and two coal mines which had been opened and were wrought by the deceased himself at the time of his death, one of each sort of which mines had from the time of his death ceased to be wrought, his heir thinking them unprofitable; the other of each sort the heir continued to work to profit.

The first question was, whether John Hanbury's widow were entitled to dower of all or any, and which of these mines and what the widow could claim to be legally assigned to her thereout as her dower? The deceased was also entitled to the following minerals lying under land which was not his own, but wherein he had purchased of the land owner liberties to work through his land, namely, a mine or stratum of coal, and another of lead ore, which he had opened and wrought during the coverture, and was working at the time of his death, since which the heir had ceased to work the lead but continued to work the coal; a mine or stratum of lead, and another of coal, which he had not opened or wrought; a mine or stratum of lead and another of coal, which he had demised to tenants for years, rendering, at their own option, which they might annually make, either pecuniary rents or rents in kind, commencing from the time when the mines should be wrought. The lead mine had been opened before the death of John Hanbury, and the tenants had paid their rents in ore in kind. The coal mine had not been opened, nor was yet opened.

In case the court should be of opinion that the widow was entitled to dower in any of the cases mentioned in the first question, the next question for the opinion of the court was, whether she was entitled to dower of all or any, and which of the mines, strata or rents, secondly above mentioned, and what she could legally claim to be assigned to her as her dower thereof.

Lastly, soon after John Hanbury's death, the heir let the widow into possession of and assigned to her, for her dowery of an estate called "A," certain closes of land in which there was an open coal mine, wrought at a certain period during the coverture, but which had ceased to be wrought long before the husband's death; and the value of the closes was amply sufficient to answer any demand of dower without regard to the value of the coal. The widow had, since her husband's death, begun to work this mine and had retained the profits to her own exclusive use.

The third and fourth questions for the opinion of the court were, whether the widow was in law entitled, in virtue of her interest of dower, or for any other reason, to work this mine for her own exclusive use and benefit?

Taking the assignment of these closes as the widow's dower, to be the act of the heir himself, and to have been a most excessive assignment in point of value, had the heir by law any and what remedy against the dowress, as against the effect of his own act?

If this assignment had not been his act, but had been made in the course of legal proceedings under a writ of dower, would the heir by law have any or what remedy against the effect of such assignment?

This case was argued by SHEPHERD and BEST, Serjeants, on behalf of the dowress. They contended that mines in general are subject to dower like all other real property. The rule may be thus laid down: Wherever a perpetual inheritance arises out of land or is connected with land, it is the subject of dower. The wife is entitled to dower of all profits of land in which the husband was seized of an estate of inheritance: F. N. B. 148. Many things of a less permanent and substantial nature than mines are subject to dower. Springs of water were held in the case of *Rex* v. *Miller*, Cowp. 619, to be profits of the land. So dower is due of tolls arising from a public navigable river: *Buckeridge* v. *Ingram*, 2 Ves. Jun. 652. If a man lets lands with liberty of digging, his wife shall not therefore the less be endowed of them. Many of the cases put by Lord Coke, 1 Inst. 32a, are of things not partaking so much of the nature of real property as mines. But whatever may be the case as to such mines as are unopened, those which are opened are clearly liable to dower. The husband by opening them has destroyed all other profits of the land, and if they are not continued to be wrought, they will be spoiled: *Clavering* v. *Clavering*, 2 P. Wms. 389. So that the working of mines, once opened, is beneficial and not detrimental to the inheritance. In *Hoby* v. *Hoby*, 1 Vern. 218, the only dispute was as to the quantum; the right to dower of mines was not doubted. A lessee for years may work mines, if open: Co. Litt. 54, b; or if let for the purpose of being opened: *Saunders' Case*, 5 Co. 12; and it is not waste. 2. As to the question how dower shall be assigned of these mines, the rule is, that where the property is of such a nature that a divided third part can not be given,

the wife is to be endowed in a special manner; as of the third toll-dish or third part of the profits.

In the case where the land above and below the mines wrought by the husband belonged to another, her right must be the same; for it is immaterial to whom the surrounding land belongs; the question must be decided upon the nature of the property itself. This can only be considered as real property; it would go to the heir, as would a fishery, which is clearly subject to dower. It is wholly immaterial whether or no the heir has wrought the mines; for since the title of the dowress is derived from the husband and not from the heir, it can not be affected by his acts or omissions. Upon these principles the widow is entitled to dower of the mines respecting which the first and second questions are raised. 3. Upon the last question it is equally clear that the widow is entitled to work the mines in the land assigned to her for dower, which were even opened in her husband's life; for tenant in dower is tenant for life, and tenant for life may work all open mines; or, at least, it rests on the other side to show on what principle she is to be restrained from the pernancy of the profits of the land assigned her.

4. But if the heir has himself set out too much for her dower, the law gives him no remedy. Where dower has been assigned by a guardian, or an infant before he was of age, there the law gives a writ of admeasurement of dower; but where the heir being of full age has himself assigned too much, neither he nor his infant heir shall have the writ: 2 Inst. 368.

LENS, Sergt., *contra.*—Where mines have been actually wrought as part of the estate of the husband, they may perhaps be collaterally subject to dower together with the rest of his real property. But mines have never been assigned as in their own nature liable to dower. The interest of a tenant in dower is a life estate only; but an interest which can enable the possessor to work mines, must be an estate of inheritance, for it is an act of waste in a tenant for life. The words of Littleton, s. 36, "lands and tenements" do not decide the question. Dower is not due of every tenement, for dower does not lie of a tenement *eo nomine: Kent* v. *Berry*, 1 Str. 625. Lord Coke, 1 Inst. 32a, enumerates all the various spe-

cies of property which are subject to dower, but he does not include mines amongst them; and it is observable that all the matters there enumerated are the subjects of annual increase and renewal, which mines are not. Thus a common is a collateral right, consisting in the enjoyment of herbage annually renewing.

The profits of a mill, of a fair, of the custody of a jail, are all of an annual nature. Mines are only to be used by the proprietor of the inheritance; for, when they are used, they are gone. This reason is still stronger in the case of mines than in that of timber, which is not the subject of dower. In *Whitfield* v. *Bewit*, 2 P. Wms. 242 tenant for life was equally restrained from waste in both.

No case is cited in F. N. B. 149, to support the assertion there made. A further reason why mines should not be subject to dower arises upon the second question; for, if a writ should issue to the sheriff to assign dower, there is no rule by which he could possibly assign it. As to the third class of mines, let for a rent, it may be answered that where the demise comprehends under one rent different species of property, some of them in their nature subject to dower, and others not, it does not follow that the wife shall be endowed of one third of the whole rent, which is partly reserved in respect of property not the subject of dower. As to the fourth class, where a man is not seized of the land, but has purchased a mere privilege to work a mine in the land of another, that can not be the subject of dower.

It is a right not capable of being granted in fee simple, which implies a perpetuity; for the mineral is a product of the earth, which will not be renewed. It may be admitted that the conduct of the heir in working or in discontinuing the mines, will not decide the question either way. Perhaps the mines which had been wrought during the coverture and continued to be wrought after the husband's decease, may fall under a different predicament from the others. As to the effect of the assignment by the heir himself, it is not to be taken that he has assigned to the widow these mines, but she has taken more than was assigned to her, and that to which she was not at all entitled; he assigned her the land, but did not intend to assign her the mines within it. If land were as-

signed in which was a grove of oaks, though the only profit of that land would be in the timber, the dowress could not cut a single tree. If indeed the heir had himself assigned more than he ought of property liable to dower, it seems that he would be without remedy: 2 Inst. 367–8; but this is not a case of actual endowment by the heir of the mines. The case of *Hoby* v. *Hoby* decides nothing, for there, although the widow had obtained an unfair advantage, the plaintiffs were willing to grant her one third of the mines, without raising the question of her right, which therefore never came under the consideration of the court.

BEST, in reply.—Lord Coke is not an authority to show that at the time when he wrote, any express decision had been promulgated on the subject of mines.

It is said by Fitzherbert, N. B. 149, that the wife shall be endowed of commons, etc., and of any other estate of inheritance of which the husband was seized. This passage, then, as well as the case of *Hoby* v. *Hoby*, are express recognitions that mines are subject to dower. In the case of *Clavering* v. *Clavering* the mines were opened subsequent to the creation of the estate for life. In the case of *Whitfield* v. *Bewit*, all the mines were unopened. As to the strata in another person's land, the husband had not, as it has been said, a mere privilege; he had an exclusive property in the stratum and a privilege to go through the surface of the superincumbent land for the purpose of working it.

MANSFIELD, C. J.

The grant of the stratum must be taken to be a grant in fee-simple. In the course of the discussion I was strongly struck with the argument used for the heir, that Lord Coke has, in 1 Inst. 32, enumerated all the species of inheritance of which a woman shall be endowed; and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage it appears to be no enumeration of all the things whereof a woman shall be endowed; nothing like it. In the 36th section, upon which this passage is a commentary, Littleton says, the wife shall be endowed of all lands and tenements of which her husband was seized. Lord Coke says not a word to explain what is land or what is a ten-

ement, thinking the import of those terms well known in the law. But the intention of the passage is to show that although all lands and tenements are subject to dower, and assignment is to be made by metes and bounds where it can, yet it is no impediment to dower that the tenements are of such a nature as that they can not be assigned by metes and bounds; but in those cases it shall be assigned as well as it can be, as by the third toll-dish of a mill, or the like. In the preceding chapter, which is of tenants by the curtesy, Littleton does not mention of what the wife must be seized; and Lord Coke, 29 b, speaks of lands only, but Littleton, s. 52, speaks of tenements. The words in both cases must receive the same exposition; and it is only necessary to see whether this species of property be land or a tenement. Comyn and the other digests which have been cited, only follow the words of Co. Litt., the reason of whose authority is above stated. In the case of trees there is a profit in the shade and pannage, but in the case of a mine the working it is the only mode in which it can be enjoyed.

A second argument was prayed on behalf of the heir, which the court refused, thinking the case sufficiently clear.

The court certified to the High Court of Chancery that their opinion upon the questions proposed to them, arising from the first and second statements in the case, was, that the widow of John Hanbury was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore and coal in the lands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his life-time, or by those claiming under him since his death.

They thought too that her right of dower of such mines, etc., could not be in any respect affected by leases made by the husband during the coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment (if made of the mines), must be of the reversions and of the rents reserved by such leases as incident to

the reversions, in which case they thought the widow would be bound, so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

In assigning the dower of Mr. Hanbury's own lands, the sheriff must estimate the annual value of the open mines therein as part of the value of the estates of which the widow is dowable; but it was not absolutely necessary that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her might consist wholly of lands set out by metes and bounds, and containing none of the open mines. Or he might include any of the mines themselves in the assignment to the widow, describing them specifically if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned; and as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit, or the sheriff might divide the enjoyment and perception of the profit of any of the particular mines as after mentioned.

In regard to the mines and strata which Mr. Hanbury had in the lands of other persons, they were of opinion that it was not necessary that the sheriff should divide each of the mines or strata, but he might assign such a number of them as might amount to one third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole.

If the division of an open mine could be made by metes and bounds, as lands are required to be divided, without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord Coke, 1 Inst. 32a, wherein it is held that the sheriff may make the assignment

in a special manner; and that therefore he might so proceed with respect to the mines in question.

They found no authority, however, establishing any precise mode of dividing a mine, nor could they point out any that might not be attended with inconvenience; but if the sheriff was to make the assignment, they thought he might lawfully execute his duty by directing separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits.

In answer to the last question proposed to them, they were of opinion that the widow was entitled to work for her own exclusive use the open mine within the close that had been assigned to her without any exception of the mine, for her dower of one of the estates, notwithstanding the excess arising from the omission of such exception; and inasmuch as the assignment was the act of the heir himself, being of full age at the time, they thought he had no remedy at law against the dowress for avoiding the consequence of that act. Had he been under age at the time, he might have had relief by writ of admeasurement of dower; or had the assignment been made by the sheriff in execution of a judgment in dower, the heir might have had a *scire facias* to obtain an assignment *de novo*.

COATES v. CHEEVER.

(1 Cow. 460. Supreme Court of New York, 1823.)

Dower due of all open mines. Dower is due of all mines wrought during coverture, but not of mines unopened at the death of the husband.

Notice of appeal, when sufficient. Legal notice of appeal was not served upon the respondent, who was a non-resident, and the statutory method of perfecting notice in such case was not clear. But it appeared that respondent had actual notice of the appeal in season to prepare his defense: *Held*, that under the circumstances the court would entertain jurisdiction.

Various methods of allotting dower. When a division by metes and bounds is practicable it should be made; otherwise dower may be assigned by allowing an alternate occupancy of the whole, or a share of the profits.

An admeasurement of dower was ordered out of the surrogate's office, of the county of Essex, on the 10th day of June, A. D. 1820. Under this order dower was allotted upon certain lands, without regard to the ore bed thereon found and worked, the admeasurers, however, making affidavit that dower of such ore bed was claimed by the widow and that this ore bed constituted the chief value of the lands.

Notice of appeal was signed by Dean Edson, as attorney for M. Coates, the appellant, and directed to Hascall & Ross, as attorneys for the respondent, Cheever, with copies of the papers, giving them notice that on reading these papers he should bring on the argument of appeal, and that this court would be moved at, etc., on, etc., that the admeasurement, etc., be set aside for irregularity and insufficiency, in the assignment, etc., and that the assignment, etc., be held for nothing, and that the admeasurer do proceed to lay off and assign to the widow, etc., her reasonable dower, etc., according to law.

Attached to the same papers was a declaration in writing, signed by Dean Edson as attorney for the appellant, and dated August 12, 1822, stating that Maria Coates thereby appealed for relief in the premises to the next Supreme Court of Judicature to be held for the State of New York, from the admeasurement, etc., and assigning for cause the omission to assign her dower according to her legal rights and particularly in not allowing her a participation in the ore bed and the profits thereof.

Copies of all the appellant's papers, with the notice of the motion, were served on Mr. Hascall, the partner of Henry H. Ross, the latter of whom acted as counsel for Cheever before the surrogate and admeasurers. Cheever himself resided in Boston and had a tenant, Walton (named in the order and served with the original papers), resident upon the premises. It was testified by Mr. Ross that Cheever never gave him any special power of agency or as attorney to act in this matter, other than a general request to keep a lookout; nor had Cheever, according to his knowledge or belief, ever given any authority beyond this to his late partner, Hascall. It also appeared that Cheever had been apprised at a very early stage of this proceeding, that an appeal had been brought in this matter and that he had retained counsel to defend the same.

It further appeared by Mr. Ross' affidavit that one sixth only of the premises was claimed, on his suggesting to the admeasurers and the opposite counsel that the husband of Maria Coates was the legal owner of only one undivided half of the premises.

It appeared further by the affidavit of Mr. Ross and others, that a part of the vein of ore then open and worked was not so opened and worked in the life-time of the husband, but that the same was opened by Walton, the tenant of Cheever, and at C.'s expense and cost; that the opening, securing and draining it, since the husband's death, had cost above $2,000, including other improvements for the convenience of digging and vending ore; that those parts opened by Coates were abandoned and had not been used or worked for about six years, and were filled with earth, water and stones. Witnesses were examined before the admeasurers after several adjournments, by whose testimony, and a view of the premises, it appeared that the premises consisted of a cultivated farm, a house, a barn and other outhouses, a wharf and a vein of iron ore, extending in length about sixty rods; that the vein of ore had been opened and worked in several places; that it had been worked down in some places as low as it could be worked without draining, and that some other places were constructed by earth and some by rocks, and that since the premises had been conveyed by Coates to the present proprietors, they had laid out a considerable sum in repairing the east end of the house; that they had built a new wharf, and opened the ore bed in a new place, which they had uncapped and sided with timber and had made a drain for the same, the expense of all which was estimated at upward of $2,000; that the expense of opening, draining and timbering the ore bed and making a road, and building a wharf for the convenience thereof, was about three fourths of the whole expense; that after about six years use of the ore bed, it would be necessary to sink a new drain which a witness was of opinion would cost about $2,000, if made as it should be, for permanent use; that the difficulty and expense of digging the ore increased with the quantity taken out, both by reason of the height to which the ore must be raised, and also of the great difficulty and expense incurred in keeping

the works free from water, inasmuch as the length of the drain was greatly increased with its depth, and the bottom is a rock; that permitting Mrs. Coates to raise ore from the newly opened vein would greatly interrupt and discommode the present occupant.

Coates had purchased one half of these premises of one Harmon, to whom he had, at the time of the purchase, executed a mortgage for the consideration money, which mortgage had been assigned to the respondent, who purchased the premises of Coates, during his life-time, and took a conveyance thereof in fee. The circumstances attending the conveyance and mortgage, are particularly detailed in the opinion of the chief justice.

Z. R. SHIPHERD, for the appellant.

S. A. FOOT, for the respondent.

WOODWORTH, J., delivered his opinion nearly as follows:

A preliminary objection is taken that due notice of this appeal has not been given. Cheever, the respondent and owner of the lands, resided in Massachusetts, but he personally appeared to answer the proceedings which were instituted before the surrogate; and while the subject was before the admeasurers, Hascall & Ross were treated as his attorneys, in all the different stages of the investigation. After the decision, they were instructed by him to keep a good lookout. The statute does not designate the person on whom, nor the manner in which, notice of the appeal is to be served. Here they were served upon Hascall, the partner of Ross. This fact comes to the knowledge of respondent, so that he has a fair opportunity of contesting the matter. He retains counsel, who watches the proceedings down to the time of the motion, when he is heard by his counsel against the appeal. Under the circumstances I think the clause of the statute requiring notice is reasonably satisfied. The party is fully apprised, and can not suffer from the omission to serve the papers upon him personally.

The premises in question contain a valuable ore bed which was partially opened by the husband of the appellant, during

his life-time. Since his death the owner has extended this opening at great expense, and with very great success. In setting off dower, the admeasurers disregarded the increased value of the land arising from the circumstance of its containing this ore bed. They estimated the value, considered merely with a view to its agricultural improvement, and assigned by metes and bounds sufficient to cover one sixth of that estimate, carefully avoiding any interference with the ore. There is no doubt that as to mines in general, including beds of iron ore, if they are unopened at the time of the owner's death, his widow must take her dower in other land merely. The newly opening a mine is waste, and the widow having only an estate for life, can legally do no act which injures the inheritance. All the cases agree in this. But it is equally clear, that if, during the husband's life-time, mines are opened, dower in them is properly assignable. In this case the admeasurement must accordingly be set aside. The admeasurer must assign to the appellant her dower in all mines which were opened during her husband's life; but she can not profit by any extension of that opening. The admeasurers should take into consideration the value of the mine as far as it was opened during the husband's life, and then assign the dower, either by measuring off one third in value, or specifically assigning a reasonable share of the profits at short periods. The case of *Stoughton* v. *Leigh*, 1 Taunt. 402, contains the rules by which, I think, the admeasurers ought to be guided.

SAVAGE, Ch. J.

By the 10th section of the act, (1 R. L. 61,) any party conceiving himself aggrieved by the proceedings before the surrogate, may appeal to this court, giving notice in writing, within thirty days after filing the report of the admeasurers, of the causes of complaint and of his intention to apply to the next Supreme Court. The notice in this case was served on Hascall, the partner of Ross, within the time; but no notice was served on the respondent, or his tenant in possession of the premises. Ross swears that neither himself nor Hascall were the attorneys of the respondent, except as being occasionally employed by him and requested to keep a lookout for him; but

they had no authority either to let or dispose in any way, of the property in question, or any other property of the defendant. Service of notice on an attorney upon record, in the progress of a cause prosecuted or defended by an attorney, is good; but Ross was merely counsel before the surrogate, where attorneys are not known as officers of the court. The case is somewhat similar to proceedings before justices. Suppose upon *certiorari* brought, the plaintiff should serve his assignment of errors upon the person who had acted as counsel for the opposite party before the justice, would this be a good service? The notice, in my opinion, should have been sent to the respondent by mail, or served upon his tenant, or upon his attorney in fact, if he had one. Either mode of service would probably be sufficient, where the respondent, as here, resides out of the State. If nothing further appeared, therefore, I should be against the application upon the question of notice. But it seems, from the papers, that the respondent had actual notice of the bringing this appeal, and this in season to enable him to retain counsel and prepare for his defense. The whole case is fully before us, and I think we are justified, under such circumstances, in entertaining jurisdiction and deciding the case upon its merits.

Admeasurers of dower were regularly appointed on application of the appellant. They assigned her dower of lands in Essex county, being the third of one half of a certain lot which is valuable chiefly on account of an iron ore bed which it contains. The admeasurers assigned the dower under an impression that she was not entitled to any share in the ore bed. They, of course, gave her no part of this bed; nor did they estimate it, in the value of the lot, in setting off the sixth part.

The widow appeals to this court, and we are now moved to set aside the assignment as inequitable. The respondent resists the application, on the ground that the appellant is not entitled to dower of the mine.

By the affidavits on the part of the respondent, it appears that John Coates, the husband of the demandant, in his lifetime, 1809, borrowed of the respondent $32,000, conveyed the premises in question to him for $15,000, and died insolvent; so that this property is all that the respondent has, or will ever be able to obtain for his debt. Coates had purchased

one half of the premises of one Harmon, at the same time giving him a mortgage thereon for the consideration money. This mortgage has since been regularly assigned to the respondent. It further appears that the pits from which the ore was taken by Coates, have filled up by the falling in of earth and stone; that the respondent has sunk a new pit, and built a wharf on the shore of Lake Champlain, at an expense of from two to three thousand dollars.

In England the law seems to be settled that the widow is entitled to be endowed of mines opened and worked in the life-time of her husband, but not of such as were unopened. Littleton says, "the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the said wife, in severalty, by metes and bounds, for the term of her life." Lord Coke, in his commentary upon this text, enumerates several cases where the widow shall be endowed, though she can not, from the nature of the property, hold by metes and bounds. One is the case of a mill, in which she may be endowed of the third toll-dish. He enumerates a variety of other cases, but is silent as to mines. In *Hoby* v. *Hoby*, the court of chancery recognized the widow's right to dower in a coal mine. In Saunder's Case it was decided, in the common pleas, that a lessee for years or for life may dig mines which are open, but shall not open new ones unless he has a lease of them specifically; and then he may dig for them. In *Clavering* v. *Clavering*, it was decided by Lord Chancellor KING that a tenant for life may open the earth in new places in pursuit of an old vein of coals, when the coal mines had been opened before he came to the estate. In *Whitfield* v. *Bewit*, it was decided that A, having an estate for life, subject to waste, shall no more open a mine than he shall cut down timber trees—but in this case the mines spoken of were those which had never been opened. In the late case of *Stoughton* v. *Leigh*, the court of chancery put several questions to the common pleas for their opinion. It is stated that the husband was seized of several lead and coal mines, some in his own land and some under the land of others. Some had been opened and worked in his life-time and some had not, and it is asked whether the widow

is entitled to dower of all, or any, and which of the mines? The common pleas answered that the widow was dowable of all the husband's mines of lead and coal which had in fact been opened and wrought before his death, in which he had an estate of inheritance, and that her right to be endowed did not depend on the subsequent discontinuance of working them, either by the husband or those claiming under him since his death, but that she was not dowable of mines which had not been opened at all; that in assigning dower the sheriff should estimate the annual value of the open mines and might assign them to her or not, and when assigned to her she may work them for her own exclusive benefit. If the property could be divided by metes and bounds, that was the most proper manner, but if it was not susceptible of such a division, he might proportion the enjoyment and perception of the profits and direct a separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject.

I can not find from what research I have been able to make that this question has ever been adjudicated, either in this State or in any of our sister States; but all the authorities in the English books, both ancient and modern, establish the right of the widow to be endowed of such mines as have been opened and worked during the life of her husband.

Mrs. Coates, then, is entitled to be endowed of the ore bed in question. The admeasurers were irregular in undertaking to decide upon her right in the land. It belonged to the surrogate to determine what proportion of the premises should be set off, and it was the duty of the admeasurers to obey his order. What facts appeared before the surrogate the court can not know; but it is to be presumed that he decided correctly, and according to the facts presented to him.

Another question for our consideration is, whether the appellant was entitled to one third, or only one sixth of the property. In *Hitchcock* v. *Harrington* it was decided that the widow of the mortgagor was entitled to dower, the mortgage being paid up and the tenant deriving title through the mortgagor, the mortgagee having never entered or foreclosed his mortgage. In *Collins* v. *Torry*, the demandant showed title from one Merrick, in 1775, to her husband. From him

it passed through Parsons and Winston, to the tenant. The tenant produced a mortgage from Merrick, in 1772, which was duly assigned to the administrator of Winston, and upon which, as appeared by an indorsement, interest was paid in 1784. The court decided in favor of the demandant; and among other things, say: "A mortgage, before foreclosure or entry, is not now regarded as a legal title, which a stranger can set up. It can only be used by the mortgagee and his representatives." It is added— "The purchase of the mortgage was, in effect, a discharge of the mortgage in favor of the title under the mortgagor. It is therefore extinguished, and the title of the tenant relates back to, and is founded on the seisin of the husband." In *Stow* v. *Tifft* the court decided that the widow of a mortgagor for the purchase money, the deed and mortgage being cotemporaneous, is barred of her dower by foreclosure of the mortgage. A question then presents itself whether the purchase, by the respondent, of Harmon's mortgage, is to be considered an extinguishment of it, or whether his possession is to be considered an entry under the mortgage in the nature of a foreclosure.

The spirit of the cases cited seems to be this: that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment, and the widow's right relates back to the purchase by her husband, and she shall recover. But where the tenant enters by virtue of a foreclosure or after a forfeiture for non-payment of the money, then the estate is deemed never to have vested in the husband, and the widow is not entitled to dower.

In this view of the case, Mrs. Coates is entitled to dower in the whole of the premises, according to the value at the time of alienation by her husband. The surrogate, therefore, was right in directing the admeasurers to lay off one third by metes and bounds, and the admeasurers erred in adopting a different rule. They ought to have assigned to the widow one third of the whole estimated value of the property, deducting the value of the improvements made since the sale by her husband. If practicable, they should have given her a proportion of the ore bed, assigning to the tenant his own improvements. If such a division was impracticable then

they should have directed an alternate occupancy of the whole, or a share of the profits, always securing to the tenant under our statute, his own improvements, or a suitable allowance for the use of them.

It was objected on the argument that a surrogate's court is not a fit tribunal to be intrusted with proceedings of this nature. This objection has no weight. The legislature has given the power, and I can see no reason why three admeasurers are not equally competent with the sheriff to make a just partition.

Accordingly the following rule was entered.

"*In the matter of Maria Coates, appellant,* and *Abijah Cheever, appellee.*

On reading and filing an appeal from the admeasurement of dower made in pursuance of an order of the surrogate of the county of Essex, and the affidavits and papers accompanying the said appeal, it is ordered that the admeasurement of dower heretofore made be set aside and vacated, and that the admeasurers proceed to assign to the said Maria, her reasonable dower in the lands and tenements mentioned and described in the order of the said surrogate; and whereas it appears that on the premises in which dower is claimed there is a valuable iron ore bed, which John Coates, the husband of the said Maria, opened and worked in his life-time, and that he was the owner and proprietor of the said lands when the said ore bed was opened and worked as aforesaid, by reason whereof the said Maria is dowable of and in all such ore beds, on the said premises, as were in fact opened and wrought before the death of her said husband, and wherein he had an estate of inheritance during the coverture, it is further ordered that in making the assignment, the admeasurers estimate the annual value of the ore beds that had been opened as aforesaid, as part of the value of the estate of which the said Maria is dowable; that the admeasurers may, in their discretion, assign the dower of the said Maria in land set out by metes and bounds and containing none of the said ore beds, or they may include any of the said ore beds, so as aforesaid opened, in the said assignment, describing them specifically, if the particular lands in which they lie should not also be as-

signed; but if those lands should be included in the assignment the open ore beds within them need not be so described, being part of the land itself assigned; or the said admeasurers may divide the enjoyment or perception of the profits of any of the said open ore beds by directing a separate, alternate enjoyment of the whole, at short periods proportioned to the share each party had in the subject, or by giving the said Maria a proportion of the profits. In each and every case, however, the said admeasurers are not to take into account, or assign dower, of any part or portion of said ore bed opened by said Abijah Cheever and others since the death of the said John Coates, nor the improvements made on the said premises by the said Abijah Cheever and others since the death of the said John Coates."

BILLINGS v. TAYLOR.

(10 Pick. 460. Supreme Court of Massachusetts, 1830.)

Defines of quarry not limited to ground actually broken. A husband died seized of land, about four acres in extent, consisting of a slate quarry. Only a small fraction, about one quarter of an acre, had been dug into, but the practice was to take a section ten or twelve feet square on surface, go down to a certain depth and then start a new section from surface: *Held*, that the entire tract was to be considered as an open quarry and that the widow was dowable of the whole.

Writ of dower. A special verdict was returned, in which the jury find that the late husband of the demandant was seized, during the coverture, of such an estate in the land described in the writ as that he could endow the demandant thereof; that the land of which dower is demanded consists of about fifty acres, a part of which, to wit, about four acres, contains a quarry of slate stones, lying mostly within from one foot to ten feet below the surface of the ground, but partially above ground; that the quarry has been opened and worked for many years, and was worked by the demandant's husband during his life, and has been worked by the tenant; that the stones of the quarry are valuable for grave stones and

other purposes; that they descend into the earth to a great depth, and will continue to afford a supply for many years; that the quarry, as now opened, is in extent about one quarter of an acre, and in order to work it to advantage, it is necessary to begin at the top of the ground at the edge of the quarry, and remove the soil about ten feet by twelve in extent, and then to work down the quarry to the usual depth; that this opening will last one or two years, as the quarry has hitherto been dug, and then the workmen begin at the surface and work down as before; that as the jury are not advised whether the demandant is or is not dowable of the quarry, they find the damage which she has sustained by reason of the detention of dower, is $60 for all the land excepting the quarry, and if she is dowable of the quarry, they assess $100 for the detention of dower of the quarry; but upon the question whether she is dowable of the quarry or not, the jury pray the direction of the court, and that their verdict may be entered accordingly.

CHURCHILL, for the demandant, referred to St. 1783, c. 36, § 4; St. 1783, c. 40, § 3; St. 1820, c. 54, § 1; *Stoughton* v. *Leigh*, 1 Taunt. 402, and cases there cited.

CUSHING, *contra*, contended that the demandant was not dowable in the quarry, or that at most she was dowable in only so much of it as had been opened in the life-time of her husband: Co. Lit. 53 b; Bac. Abr. Waste, C; 2 Rol. Abr. 816; *Saunder's Case*, 5 Co. 12; *Whitfield* v. *Bewit*, 2 P. Wms. 242; *Clavering* v. *Clavering*, Id. 388; *Hoby* v. *Hoby*, 1 Vern. 218; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Coates* v. *Cheever*, 1 Cowen, 461; *Conner* v. *Shepherd*, 15 Mass. 167.

SHAW, C. J., afterward drew up the opinion of the court.

Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the life-time of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death by the heir or his assignee: *Stoughton* v. *Leigh*, 1 Taunt. 402.

In New York the right of dower has been held to attach to a bed of iron ore, and that such a bed of considerable extent must be regarded as opened, although the openings which had been wrought by the husband had been partially filled up and abandoned, and other openings into the same bed had been made by the heir: *Coates* v. *Cheever*, 1 Cowen, 460.

The only question appears to be, whether it is sufficiently shown by the special verdict that the whole of the slate quarry described therein was opened and wrought previously to the death of the demandant's husband, so that it ought to be taken into consideration in connection with the residue of his estate, and dower assigned in the whole; and the court are all of opinion that it was.

A tract of about four acres, lying together, contained the slate quarry, about a quarter of an acre of which had been dug over. The stone lay partly above, and the residue immediately under the surface, and as in going down the quality improved, the practice had been to take a section of ten or twelve feet square, and to go down to the usual depth, and then begin on the surface again. We think it would be too narrow a construction to say no part of this quarry was opened except that portion which had been actually dug; but it must be considered that the whole, lying together as one tract, belonging to one estate, and wrought in the manner described, was opened, and therefore that the widow was entitled to dower in that as well as the other estate of which her husband had been seized during the coverture. The judgment, therefore, on the special verdict must be entered for the larger sum.

LENFERS ET AL. v. HENKE ET AL.

(73 Illinois, 405. Supreme Court, 1874.)

Dower at common law. The general doctrine is that the widow is dowable of mines open or worked during coverture, but not in deposits not opened at all; as to mines once opened, she is not confined to the old approaches.

Dower in mines opened after coverture but before assignment. No distinction can be perceived between mines open during coverture and mines opened by the heir before the widow's assignment of dower, and

as to such latter, *held*, that she is entitled to dower therein the same as if opened during her husband's life-time.

Agreement between heir and dowager who is also co-tenant. Where a widow, seized in her own right of a one third interest in lands and claiming dower out of the other two thirds, of which her husband had died seized, made an agreement with the heir (of such two thirds) by which each was to receive one half of the profits of mines: *Held*, that such contract may be treated as an assignment of dower as to such two thirds interest.

Working mines opened by heir. It is not waste for widow to work mines opened by her husband, nor by *the heir before assignment of dower*.

Indivisibility of mines. Mines are from their nature indivisible and not partible (in most cases). The only partition that can be made is by sale, dividing the proceeds.

Contract amounting to assignment of dower. Contract between the heir of full age and dowager, giving her a portion of the rents or profits, if fairly made, will bind the heir and all privies in estate.

Statute of Frauds. Dower is not created but only ascertained by an assignment or admeasurement thereof, and therefore if assigned by parol, the contract is not within the Statute of Frauds.

Appeal from the Circuit Court of Jo Daviess County; the Hon. WILLIAM BROWN, Judge, presiding.

This was a bill filed by Caroline Lenfers and Henry Lenfers, her husband, against Anna C. Henke and John A. Burrichter, her guardian, for the assignment of dower in certain mineral lands. The bill showed that the complainant, Caroline Lenfers, was the owner in fee of one third part, and the defendant, Anna C. Henke, of the other two thirds, and that the mother of said Anna C., in her life-time had agreed with the complainant that the mineral rents and profits of said lands should be equally divided between them, etc. The defendants answered denying the right to dower, and the court on the hearing, held the agreement null and void. The other facts appear in the opinion.

Mr. LOUIS SHISSLER, for the appellants.

Messrs. D. & T. J. SHEEAN, for the appellees.

Mr. Justice SCOTT delivered the opinion of the court.

The demandant is herself the owner in fee of the undivided one third part of the land in which dower is sought, and the defendant, Anna C. Henke, is the owner of the other two thirds.

A portion of these lands contain lead mines, all of which were discovered and opened after the right of dower attached. It was not known in the life-time of the demandant's husband that any valuable mines existed in these lands. Two children were living at the death of the husband, one of whom has since died. The entire estate then passed to the widow and the other child, Mary Louisa Camphouse, who afterward intermarried with Henry Henke, both of whom are now dead, leaving Anna C. Henke, the infant defendant, as their only heir at law.

It is alleged it was agreed between Mary Louisa, in her life-time, and her mother, Mrs. Lenfers, in consideration of her dower interest, the proceeds of the mineral rents derived from the mines discovered in these lands should be equally divided between them. Mines were accordingly opened that proved very valuable. The agreement as to the division of the rents was faithfully carried out by Mary Louisa during her life-time, by her husband after her death, and after his death by the guardian of their minor heir until the month of November, 1872, when he and the smelters, through whose hands the rents passed, declined to make any further division on the basis of the agreement, until the rights of the parties should be judicially determined. The relief sought is that the agreement be declared to stand as an assignment of dower, and as conclusive of the existing rights of the parties; but if the contract should be adjudged void, the widow may have dower assigned to her.

The question presented is one of first impression in this court. The general doctrine is, where mines have been opened and worked during the life-time of the husband, the wife is dowable, but not in mines or strata not opened at all. It makes no difference, the mines may have been temporarily abandoned; it is only material they were opened in the life-time of the husband. She may not only work the mines, but she may construct new approaches to them: *Stoughton* v. *Leigh*, 1 Taunt. 402; *Coates* v. *Cheever*, 1 Cow. 474.

The first case we have been able to find on this subject is *Hoby* v. *Hoby*, 1 Vern. 218. In that case it is assumed the wife has dower n mines, but whether it is in mines opened during the life-time of the husband or not does not appear.

The next and leading case is *Stoughton* v. *Leigh*, *supra*. The question as to mines opened by the heirs was not raised. The judges only gave opinions on the two points indicated: 1st. The wife was dowable of mines opened and worked by the husband. 2d. She was not dowable of any mines or strata not opened at all. In many of the latter cases, as well as the earlier cases, no reason whatever is assigned for the adoption of the rule; but where any is assigned, it is, the dowress can not open new mines when discovered because she would be committing waste, which she is not permitted to do. On principle, why may she not be endowed of mines opened by the heir or owner of the fee, after the dower attaches and before there has been any assignment? By all the decisions it is not waste for her to work mines opened, although the same had been abandoned before the death of the husband. She may construct new approaches and not be guilty of waste. On the same principle, if the cases on this question can be said to rest on any principle, she could work mines opened by the heir without being guilty of waste. The reason for the rule adopted, that bars dower in all mines not opened during the life-time of the husband, failing, the rule ought not to be extended to cases not strictly within its meaning. In view of the comprehensive definition given by common law writers of the things of which the wife is entitled to be endowed, which include almost everything of a permanent nature, whether it is of a material or ideal kind, there can be no reason for giving the rule any broader construction than has heretofore obtained.

Our statute does not define dower. It provides for the assignment, but leaves the interest to be determined as at common law. By reference to the authorities, we find at common law the wife was entitled to be endowed of all lands and tenements of which the husband died seized. The import of those terms is well known in the law. Land comprehends all things of a substantial nature, which includes any ground, soil or earth whatever, and hath in its legal signification an indefinite extent upward as well as downward. "Therefore," says Blackstone, "if a man grants all his lands, he grants thereby all his mines of metals and other fossils, his woods, his waters and his houses, as well as his fields and meadows." Tene-

ment, according to the same author, is a word of still greater extent, and in "its original, proper and legal sense, signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind": 2 Black. 17*, 18*.

The minerals in this land are a part of the land itself, and if, by reason of the mines, it is not susceptible of division, the wife is entitled to be endowed of the profits or rents. The principle is, she is entitled to dower of all the profits of lands and tenements of which her husband was seized as of an estate of inheritance. In *Stoughton* v. *Leigh*, *supra*, it is said, "it is no impediment to dower that the tenements are of such a nature they can not be assigned by metes and bounds, but in those cases it shall be assigned as well as it can be, as by the third toll-dish of a mill or the like."

In the case of *Dickin* v. *Hamer*, 1 D. & S. 284, although the decision was placed on other grounds, the vice chancellor expressed the opinion that a widow, dowable of the real estate of her husband, not having done anything to preclude her from doing so, may claim one third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but not one third of the corpus.

The demandant's interest in these mines comes strictly within the definition of dower, and if she is to be barred of that right it must be upon some principle or for some reason known to the law. We have not been able to find any authority exactly in point, but the reasoning of the decisions on this question tends to support the theory we are endeavoring to maintain, viz.: There is no reason why the wife may not be entitled to be endowed of mines opened by the heir or owner of the fee after the right of dower attaches, and before there has been any assignment, as well as in mines opened by the husband. In *Coates* v. *Cheever*, *supra*, it was decided the right of dower attached to a bed of iron ore; that such bed of considerable extent was regarded as opened, although the openings which had been worked by the husband had been partially abandoned, but other openings into the same bed had been made by the heir.

In *Carr* v. *Carr*, 4 Dev. and Bat. 179, it was decided that while the dowress could not use trees standing on the dower

lands, for making turpentine, which had not been used by her husband for that purpose, still she could rightfully use trees in the ordinary mode for making turpentine, that had been boxed and tended in the life-time of her husband, and might box new trees as those already boxed became unfit for use, so as not to enlarge the crop beyond what it had been when the dower was assigned. The case of *Findlay* v. *Smith*, 6 Munf. 134, is illustrative of the same doctrine.

What possible difference could it make, whether the trees were boxed by the husband or by the heir before assignment of dower? In either case she would be entitled to the profitable and natural use of the dower estate, so she does not commit waste. The heir, by opening the mines, had destroyed all other profits of the land. There is no mode of enjoying mines except by working them. If this can not be done they are profitless to the dowress. As we have seen it is not waste in her to work mines opened by her husband, and by a parity of reasoning, we reach the conclusion, it is not waste for her to work mines opened by the heir before assignment of dower. At all events, she would be entitled to dower in the profits, in case the mine should be worked by the heir or owner of the fee, before assignment of dower.

But the agreement proven may be regarded as an assignment of dower. Mrs. Lenfers and her daughter being the owners of the fee of the lands, had the right to open mines and cause them to be worked. When the mines in question were opened no assignment of dower had been made. That Mrs. Lenfers had dower in the lands is not controverted. Independently of any agreement, she, being the owner in fee of an undivided one third of the lands, was entitled to one third of the mineral rents. The mines, when opened, in their very nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds: *Conant* v. *Smith*, 1 Aik. 67; Bainbridge on Mines, 155*; *Adam* v. *Briggs Co.*, 7 Cush. 361. The only partition that can be made is to order a sale of the mines and divide the proceeds: *McGillivray* v. *Evans et al.*, 27 Cal. 92.

After the mines in this case had been opened there was no practicable way in which dower could be assigned by metes and bounds. It was assigned in the only way that it could be equitably done, by giving the dowress a distinct portion

of the mineral rents. The right of dower existed and it was competent for the heir herself to make the assignment. If of lawful age, the assignment once fairly made would bind the heir and all privies in estate, and would be conclusive of the subsisting rights of all parties in interest.

But, at common law, the infant heir may assign dower for the reason, as it is said, the widow's "claim is urgent and necessary for her immediate support:" Bainbridge on Mines, 151*. However, the law protects the heir against the effects of an excessive or fraudulent assignment: *Hoby* v. *Hoby*, *supra.*

The objection that the agreement was not in writing, and therefore within the Statute of Frauds, is not well taken. Treating it as an assignment of dower, it was valid although existing in parol. Bainbridge, in his work on Mines, says, "dower may be assigned by parol, notwithstanding the Statute of Frauds, for her estate is not created, but only ascertained by assignment; and where she has entered after assignment, the freehold vests in her without the livery of seizin, whether the assignment has been accomplished by agreement or by the course of the law:" Bainbridge, 149*.

Sir Edward Coke, in his Commentaries, after stating briefly of what, by whom, and to whom the assignment must be made, adds: "But there needeth neither livery of seizin nor writing in any assignment of dower, because it is due of common right": Coke on Lit. 35a.

We have no doubt the agreement between the complainant and her daughter, Mary Louisa, was in fact an assignment of dower in the mines situate in the lands in which she had dower, and as such it is conclusive of the rights of the parties, unless it can in some mode be impeached. The heir elected to treat the mines as opened, and there is, and can be no reason why she could not assign dower therein out of the rents arising from their use. This she did. It was founded on a valid consideration, and it must be permitted to stand as a subsisting agreement as to the parties to it, and all privies in estate. The heir takes the estate with this charge upon it.

The decree will be reversed, and the cause remanded for further proceedings authorized by the principles of this opinion.

Decree reversed.

HENDRIX, Executor, v. MCBETH ET AL.

(61 Indiana, 473; 28 Am. R. 680. Supreme Court, 1878.)

Dower in royalties. A widow is entitled to dower out of mines opened in her husband's life-time, and to her proper share of the royalties accruing out of mines which her husband had demised in his life-time.

From the Clay Circuit Court.

I. M. COMPTON, G. A. KNIGHT, C. H. KNIGHT, and C. MATSON, for appellant.

S. W. CURTIS and ——— HOLLIDAY, for appellees.

NIBLACK, C. J.

This was a suit by Eli Hendrix, executor of the last will of John Hendrix, deceased, against Robert McBeth, John McDowell, Major Collins and Joanna Hendrix.

The complaint stated that the decedent, in his life-time, to wit, on the 20th day of May, 1873, entered into a written agreement, known as a lease, with the defendant McBeth, by the terms of which he, the decedent, granted, demised and let to the said McBeth certain real estate therein described, for the sole purpose of digging, mining and removing coal therefrom, for the period of twenty years from said date; and that for all screened coal so dug, mined and removed, the said McBeth agreed to pay the decedent thirty cents per ton of 2,150 pounds, payments to be made monthly; that said McBeth entered upon said real estate, sunk a shaft and began the mining of coal; that afterward he assigned an interest in said lease to the defendants, McDowell and Collins; that afterward, to wit, on the 27th day of July, 1875, the decedent entered into a supplemental agreement with the defendants McBeth, McDowell and Collins, by which the original lease was modified in respect to the rate of rent or royalty to be thereafter paid on coal dug and mined as follows: "For the month of June, 1875, said Hendrix agrees to take 20 cents per ton; for the months of July, August and September, 1875, the sum of 15 cents per ton, and from September 30, 1875,

to June 1, 1877, the sum of 20 cents per ton," etc. That on the 25th day of August, 1875, the said John Hendrix died testate, leaving the defendant, Joanna Hendrix, as his widow, and certain children and grandchildren, the issue of a former marriage, as his lineal descendants surviving him; that the said Joanna was the wife of the decedent by a second marriage, and had no children by the said decedent; that by the terms of the will of said decedent, the plaintiff, as the executor thereof, is authorized, empowered and directed to collect and receive the rents and profits accruing from his real estate and to apply the same to the payment of the debts due from and owing by his estate, and in discharge of certain legacies provided for in said will, if the personal property belonging to his said estate should prove to be insufficient for such purposes; that there are debts outstanding against said estate amounting to about the sum of $10,000 exclusive of said legacies; and that the personal estate of said decedent, over and above the portion claimed and taken by the widow, amounted to only about $600; that the said Joanna, as the widow as above stated, elected to take her interest in the estate under the statute, and not under the will of the decedent, in which a provision was made for her; that under the statute she is entitled to only a life estate in one third of the decedent's real estate, which said real estate has not yet been partitioned amongst those having an interest therein; that, since the death of the decedent, the defendants McBeth, McDowell and Collins have dug, mined and removed from the real estate so leased to McBeth and so held by them under said lease and the agreement supplemental thereto, about 5,000 tons of screened coal, the royalty of which amounts to about $1,000; that, of said last named sum, they have paid to the plaintiff as executor as aforesaid, only two thirds thereof; that they have refused to pay over to him the remaining one third of said royalty, although the same has been specially demanded of them by the plaintiff at each monthly settlement concerning the royalty due under said lease, and the supplemental agreement modifying the same; that there is due to estate of said decedent, for balance on said royalty of coal, the sum of $300, withheld as above stated, and which the defendants, McBeth, McDowell and Collins, refuse to pay until the court,

by proper judgment or decree, shall determine whether the plaintiff, as such executor, is entitled to receive the same, or whether the defendant, Joanna Hendrix, as the widow of the decedent, is entitled thereto, they claiming that the said Joanna is exacting and demanding payment from them to her of one third of said royalty, as the widow of the decedent. Wherefore, the plaintiff demanded a judgment determining the rights of the respective parties in the premises, and for a recovery of said sum of $300 against the said McBeth, McDowell and Collins.

The defendants, McBeth, McDowell and Collins, demurred to the complaint for want of sufficient facts to constitute a cause of action against them. The defendant, Joanna Hendrix, also filed her separate demurrer to the complaint, alleging the same ground of objection to its sufficiency.

These demurrers were both sustained by the court, and the plaintiff electing to stand by his complaint without amendment, judgment was rendered against him upon the demurrers.

We have, therefore, only to consider the sufficiency of the complaint on this appeal.

Upon the facts stated in the complaint the defendant, Joanna Hendrix, is only entitled to a life interest in one third of the decedent's real estate. Her interest in such real estate is quite similar to a widow's dower interest at common law, the only difference now occurring to us being that the said Joanna became entitled to her interest in her husband's real estate immediately upon his death, whereas "a widow, at common law, does not become vested with title to her dower interest until it is assigned to her."

Kent, in his Commentaries, vol. 4, p. 41, says:

"Dower attaches to all real hereditaments, such as rents, commons in gross or appendant, and piscary, provided the husband was seized of an estate of inheritance in the same. * * * * So, dower is due of iron or other mines wrought during the coverture, but not of mines unopened at the death of the husband; and if the land assigned for dower contains an open mine, the tenant in dower may work it for her own benefit; but it would be waste in her to open and work a mine."

Bishop on Married Women, vol. 1, sec. 263, says:

"If there are opened mines on the husband's lands, the widow, on these lands being assigned her for dower, may work them, and it is not waste. Of course she is not confined strictly within the limits to which her husband had worked; for if she were she could take nothing. For example, where there were four acres consisting of a slate quarry, and a quarter of an acre had been dug over in the life-time of the husband, the whole on a question of dower, was considered as having been opened. And new shafts in a mine may be sunk, and old shafts sunk deeper, where all the material taken out is from one continuous body."

Further on, in section 264 of the same volume, Bishop says:

"And the doctrine appears to be general, that if there are mines even on the husband's land, and these mines have been opened, though afterward abandoned and closed by the husband, there may be special dower of them, and the widow has the right to her share in the product."

The doctrine thus enunciated by both Kent and Bishop is well sustained by numerous cases, amongst which the following may be cited: *Coates* v. *Cheever*, 1 Cow. 460; *Moore* v. *Rollins*, 45 Me. 493; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Billings* v. *Taylor*, 10 Pick. 460; *Rockwell* v. *Morgan*, 13 N. J. Ch. 389; *Neel* v. *Neel*, 19 Pa. St. 323; *Irwin* v. *Covode*, 24 Pa. St. 162; *Russell* v. *Russell*, 15 Gray, 159; *Findlay* v. *Smith*, 6 Munf. 134; *Crouch* v. *Puryear*, 1 Rand. 258; *Steven's Heirs* v. *Stevens*, 3 Dana, 371.

In our opinion this doctrine is equally applicable to the interest which the defendant, Joanna Hendrix, took in the real estate of her deceased husband under the statute, and establishes her right to an undivided share in the coal mine in the possession of her co-defendants, as a part of such real estate.

We see no error in the decision of the court sustaining the demurrers to the complaint.

The judgment is affirmed, at the costs of the estate of John Hendrix, the decedent.

1. It is not waste for tenant in dower to sink new pits on coal bed already opened: *Crouch* v. *Puryear*, 1 Rand. 258. *Post* WASTE.

2. Widow allowed dower in clay banks: *Rockwell* v. *Morgan*, 13 N. J. Eq. 389: and in lime quarry: *Moore* v. *Rollins*, 45 Me. 493.

[1]FLETCHER ET AL. V. SMITH

(Law Reports, 2 App. Cases, 781. House of Lords, 1877.)

Responsibility for accident from natural causes. A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.

Responsibility from tampering with natural course of stream. But where for his own convenience he does something, *e. g.*, divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.

Circumstances which will create liability in such a case.

This was an appeal against a decision of the Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer.

Smith was the plaintiff in an action of trespass. The declaration contained four counts. The first was for trespass generally, the second alleged that the plaintiff was possessed of a close called Crossgill, and of the mines under the same, and that the defendants were possessed of an adjoining close, called Goose Green, and of the mines under the same, being in communication with, but on a higher level than the plaintiff's mines, and alleged that the defendants wrongfully made holes in the surface of their land, and thereby wrongfully introduced quantities of water into the plaintiff's mines.

The third count charged that the defendants permitted certain holes in the surface of their lands to remain open after such holes had ceased to be required for the proper working of the defendants' mines whereby the mines of the plaintiff were flooded. The fourth count stated that the defendants

[1] S. C. 21 English R. 38; and see *Rylands* v. *Fletcher*, L. R., 3 H. L. 330; *Post* FLOODING, with notes; 1 Thompson on Neg. 2, 77.

had negligently diverted a water course flowing through their land without making a proper and sufficient channel to prevent it from flooding the adjacent land, by reason whereof it had flowed into the defendants' mines and so into the plaintiff's mines, and had flooded them.

The defendants pleaded several pleas, and also demurred to the second, third and fourth counts. Replication and joinder in demurrer.

The cause was tried in 1872 before Mr. Justice LUSH, when it was proved that the defendants' mine was on the higher, the plaintiff's on the lower level; that the defendants had diverted the course of a stream, and had made a new course for it; that in their workings of their own mine they had occasioned certain portions of the surface to sink into holes, though in doing this they had not acted negligently; that on the happening of a very heavy downfall of rain the water had overflowed its new course, got into the holes on the surface, and passed into the defendants' mine, and thence flooded the plaintiff's mine.

It was contended for the defendants that they were thus shown not to be in fault, and that they were entitled to the verdict, or that a nonsuit ought to be entered. The learned judge, however, ruled that as the defendants had by their own acts occasioned the water to collect in the surface holes and to overflow, they were absolutely liable for the consequences, and he rejected the evidence proposed to be given that the defendants had used all reasonable precautions against an ordinary overflow of water, and that this mischief was entirely to be attributed to a rainfall of exceptional severity.[1]

The plaintiff accordingly obtained a verdict against which rule was obtained for a nonsuit or a new trial, but which was sustained after argument in the Court of Exchequer: *Nom. Smith* v. *Fletcher*, Law Rep. 7 Ex. 305. The case was then taken to the Exchequer Chamber, where the court so far sustained the decision as to refuse a nonsuit, but so far reversed it as to direct that a new trial should be had: Law Rep. 9 Ex. 64.

The second trial took place before Mr. Baron POLLOCK, at

[1] It was said that the rainfall amounted to three inches in thirty-four hours, the general average at that place being forty-five inches in a year.

the Cumberland summer assizes in 1874, when evidence of the very excessive rainfall was given and the learned judge left five questions to the jury: "1. Was the mine flooded from natural causes or from anything done by the defendants? Answer. From the act of the defendants. 2a. Was the flooding occasioned in the whole or in part by the diversion of the stream? Answer. In part, and chiefly by the diversion of the stream. 2b. Or by the deficient condition of the new channel and the banks thereof? Answer. And by the condition of the new channel. 2c. Was the stream in its diverted course more likely to overflow in time of flood, and would its overflow do more damage to the plaintiff than if it had been allowed to flow in its former channel? Answer. The stream in its diverted course would be more likely to overflow and so do more damage to the plaintiff. 3. Was the flooding occasioned by the failure of the diverted channel or other means to intercept the surface water on the broken ground? Answer. Yes. 4. Was the flooding occasioned not by the insufficiency of the channel, but by the result of the exceptional rainfall? Answer. The rainfall was exceptional, but the new channel was insufficient. 5. Was what was done by the defendants done in the ordinary, reasonable and proper working of their mine? Answer. Yes, if the diversion of the stream had been properly executed."

The verdict was entered for the plaintiff. Leave was reserved to enter a verdict for the defendants, but a rule for that purpose was, on the 22d of November, 1875, discharged; and, on appeal, that decision was, on the 21st of February, 1876, affirmed. This appeal was then brought.

The Attorney-General (Sir J. HOLKER, Q. C.), and Mr. BAYLIS, Q. C. (Mr. VINCENT was with them), for the appellants, the defendants below.

The findings of the jury were substantially in favor of the defendants and the verdict ought to be entered for them. Where every reasonable precaution had been taken to prevent mischief from an overflow of water, the fact that it did overflow in consequence of an unprecedented storm of rain was not to be imputed as a fault to the defendants, but was an act of nature, for the consequences of which they were not re-

sponsible. The case of *Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330, was not adverse to the defendants. On the contrary it laid down a principle which the evidence at the second trial of this case showed to be applicable in their favor. They had used their land in the ordinary manner of its use, and if mischief happened thereby they could not be held liable.

They had not brought themselves within the application of the other rule in the case, for they had not brought upon their land anything in itself mischievous and then left it without taking proper precautions against the mischief. They had not brought the water on the land, it was there before; they had merely diverted its course and in doing so they had taken every reasonable precaution to prevent mischief, for the evidence showed that the new course of the stream was much more capacious than the old, and therefore, according to all ordinary calculation, would carry off the water more quickly. One witness, indeed, expressly stated that "the diversion was quite sufficient to take all the water in ordinary times." The defendants were not responsible for extraordinary times and the occasion in question was shown to be one of the most extraordinary.

Wilson v. *Waddell*, 2 App. Cas. 95, a very recent decision of this House, was entirely in favor of the defendants. It was there held that the right to work mines was a right of property, which, being properly exercised, begot no responsibility; and therefore, when the ordinary working of a mine caused a subsidence of the surface land, a consequent flow of rain water into a lower coal field gave no right of action. Here what had been done had been so done in the exercise of the ordinary rights of a mine owner; it had been done in a careful and proper manner, and the means provided for the flow of the water were "more capacious than before." There was, consequently, no reason either in fact or law for holding these defendants liable. The principle which all these latter cases had developed was stated years ago in *Smith* v. *Kenrick*, 7 C. B. 515; 18 L. J. (C. P.) 172, namely, that where there were owners of two adjoining mines, neither being subject to a servitude to the other, each had a right to work his own mine in a manner most convenient and beneficial to himself, although the natural consequence might be that some prejudice would

accrue to the owner of the adjoining mine, so long as that did not arise from any negligence or misconduct. That case was cited and commented on and adopted in *Rylands* v. *Fletcher*, Law Rep. 3 H. L. 330, 335, 339. *Baird* v. *Williamson*, 15 C. B. N. S. 376, was also cited there and adopted, and that case declared that the owner of the upper of two adjoining mines was not liable for injury by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner. There was no duty on a mine owner or other person, to take precautions against the possible operations of nature, nor against the acts of other people. So that even under the words of a statute (8 Vict. c. 20, s. 68) made for the protection of railway passengers, it was held that no duty was imposed on a railway company to keep up fences along the line, so as to prevent cattle straying on the line and so occasioning danger: *Buxton* v. *The North Eastern Railway Company*, Law Rep. 3 Q. B. 549. The case of *Williams* v. *Groucott*, 4 B. & S. 149, was not an authority against the defendants, for the question there depended entirely on the relative rights of the owner of land and of a person who had a special right to sink a shaft on that land in order to work the mine below. That case was, therefore, entirely inapplicable here. But *Nichols* v. *Marsland*, 2 Ex. D. 1, was clearly in favor of the defendants, for there it was held that one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water if that is caused by the act of God, or *vis major*—as by an extraordinary rainfall which could not have been anticipated.

And that was held, although, if it could have been anticipated, the effect might have been prevented.

And the principle was in reality admitted in *Crompton* v. *Lea*, Law Rep. 19 Eq. 115, where a bill to prevent certain works in a mine was held sustainable only because there was a distinct allegation that the works could not be executed without occasioning the damage sought to be prevented. Nothing of that sort could be said here. The water courses were well executed, they were larger and more capacious than the old ones, and nothing but this extraordinary rainfall, which no one could have foreseen, and against which no one could have provided, had occasioned the mischief.

Mr. CROMPTON, for the respondent.

There was nothing in the cases cited to prevent the plaintiff from recovering, and the evidence and the findings of fact showed that the mischief had really arisen from the act of the defendants in not having in their new water course sufficiently guarded against the mischief of an overflow.

Lord PENZANCE:

My lords, the plaintiff's claim in this case was for damages in respect of the injury caused to his mine by the flood water which he alleges that the defendants wrongfully caused to flow into it. The water in question flowed down into the defendants' own mine, through certain fissures or cracks in the surface of the soil above (and particularly through a hole known as *Paddy Murray's Cut*), which had been caused by the defendants having removed the soil below in the course of his mining operations, and from the defendants' mine it flowed into the plaintiff's.

Your lordships can not be asked, after the decision of this House in the recent case of *Wilson and another* v. *Waddell*, 2 App. Cas. 95, to hold that the defendants are liable as for a wrongful act for thus cracking and laying open the soil above their own mine, so as to let through the rain water which might fall thereon.

Nor, indeed, although such a claim was originally made in the declaration, was it persevered in at your lordship's bar; but the plaintiff's ground of complaint was narrowed to this, that the defendants had diverted a natural water course which ran across and over his mine, and that the diverted water course had been so inefficiently constructed that on the occasion of certain heavy falls of rain, the water flowed over the top of the artificial bank of the water course, carried away a part of that bank, and thus released, poured down in large quantities through the fissures and holes in the surface and flooded the plaintiff's mine.

The answer of the defendants to this complaint was, as presented to your lordships in argument, that the new and diverted water course was as efficient for carrying off the water as the old one had been, but that the rainfall and consequent

flooding, were of so unusual and exceptional a character that neither the new nor the old water course, if that had been in existence, could possibly carry off the water.

The case has been before two juries; it seems to have been withdrawn from the first, but on the second occasion the learned judge left several questions to the jury for their decision, the answers to which are now before your lordships, and the contention of the defendants is, that upon those answers and upon such inferences of fact as your lordships may draw from the evidence, not inconsistent with these findings, the defendants are entitled to have the verdict entered for them.

At the threshold of the inquiry as to the defendant's liability to the plaintiff, lies the question—what obligations did the defendants incur when they diverted the natural water course? It is not, on the one hand, a question in this case, whether the defendants were required thus to divert the water course before they pursued their mining operations in its neighborhood; and, on the other hand, it is not made a ground of complaint against them that they did divert it.

But in diverting it what were their obligations?

Was it enough to make the new and artificial water course as efficient but no more so than the old and natural one, so that whatever defects, incapacity, or otherwise, the old one had, might, without responsibility, be reproduced in the new one?

Or, secondly, were they bound (as they for their own convenience were making a new and artificial water course), to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality?

Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy, however unusual, and however contrary to all previous experience?

The choice between these three propositions is a question of interest capable of being variously regarded, and before a decision is come to upon it, the matter should be very carefully considered.

For my own part, I am inclined to think that the second

proposition defines the true measure of the defendants' obligations, but I desire to express no positive opinion to that effect.

For I submit to your lordships that you are not called upon to give your adhesion to any one of these propositions on the present occasion, inasmuch as whichever of the above three propositions may properly define the defendants' obligations, it is plain, from the undisputed facts of the case, that they did not fulfill the last of them, and it is, I think, equally plain that the jurors have found that they did not fulfill either of the other two.

I will shortly point out that this is so.

The jurors first say, generally, that the flooding was caused "by the act of the defendants," as distinguished from "natural causes."

In their next answer they say the flooding was caused chiefly by "diverting the stream," and "by the condition of the new channel." In other words, they affirm that it was by directing the stream into a channel, the condition of which was not sufficient, that the major part of the mischief was done.

These answers, if they stood alone, would leave it open to be contended that the "condition" which they considered insufficient was a condition which, although sufficient to meet the requirements of any rainfall which might reasonably be expected, was yet insufficient to encounter the pressure of an exceptional rainfall such as could not be reasonably anticipated.

But this view of the meaning of the jury is no longer possible when their answer to question four is considered. The question was pointedly put to them, "Was the flooding occasioned *not by the insufficiency of the channel, but by the result of exceptional rainfall?*" and the answer is, "The rainfall was exceptional, but the new channel was insufficient." To which they add, in their fifth and last answer, "What was done by the defendants would have been done in the ordinary, reasonable and proper working of the mine, if the diversion of the stream had been *properly executed*."

These answers make it clear, I think, that the insufficient condition of the new channel to which the jurymen were referring was an insufficiency to cope with a rainfall *not excep-*

tional, or, in other words, a rainfall such as might by a reasonable man be anticipated.

The remaining point, which was chiefly, if not wholly, relied upon in argument before the House, was this: that the new water course was as capable of carrying off the waters, on the occasions in question, as the old one would have been. This question, it was argued, had never been presented to the jury, whereas the evidence upon it was largely, if not wholly, in favor of the defendants.

As regards the weight of evidence, I consider that it is not open to this House upon this appeal (which is against the discharge of a rule obtained by the defendants to enter the verdict for them upon the findings of the jury), to entertain the question whether the verdict was against the weight of evidence.

And, as regards the contention that the comparative capacities of the two water courses were never submitted to, or adjudicated upon by the jury, I conceive that it is wholly untenable in the face of the following question put by the judge, and answer given by the jury: "Was the stream in its diverted course more likely to overflow in time of flood, and would it overflow and do more damage to the plaintiff than if it had been allowed to flow in its former channel?" Answer: "The stream in its diverted course would be more likely to overflow and so do more damage to the plaintiff."

Nor can it be said that the attention of the jury was not called to the full meaning and understanding of this question. For in summing up the learned judge said, "Therefore I ask this question: Whether the flooding was occasioned by the diversion of the stream, or by the deficient condition of the new channel, or the banks thereof? To make that clear, I may also ask you was the depth of the channel such as to make it as capacious and efficient as the former channels?"

It is clear, therefore, I think, that the jury considered the new channel not as efficient as the old one would have been. And although it seems to have been proved as a matter of measurement, that the cubical capacity of the new channel surpassed that of the old, it must be borne in mind that the bends and curves in the new channel, which did not exist in the old one, may have had the two-fold effect of impeding the

rapid discharge of a great body of water, and of creating by a great accumulation of water an unusual strain upon the banks, at the points where these bends occurred, causing the overflow of the water and the gradual destruction of the banks themselves.

The jurors, several of whom appear to have viewed the spot, may well, therefore, have been justified in coming to a conclusion against the insufficiency of the new water course as compared with the old, notwithstanding the evidence as to its cubical capacity upon which the defendants' counsel so strongly relied.

For these reasons I submit to your Lordships that the decision of the court of appeal, affirming the decision of the exchequer division should be affirmed by this house, and the appeal against it be dismissed with costs.

The Lord Chancellor (LORD CAIRNS):

My Lords, I do not think it necessary in this case to say more than that I have attentively listened to the opinion so clearly expressed by my noble and learned friend; I have, indeed, had previously an opportunity of considering, upon paper, that opinion, and it so fully expresses the views which I entertain as to this case, that I shall not say more than that I entirely concur in the motion which he has proposed to your Lordships.

Lord HATHERLEY:

My Lords, I too have had the advantage of perusing the opinion which has just been delivered, and concurring, as I do entirely, in the view which he has there expressed, I am content to say that I agree in the decision proposed to be pronounced.

Lord BLACKBURN:

My Lords, I also entirely concur in the opinion.

Lord GORDON:

My Lords, I also concur, and I think it unnecessary to add many observations.

My Lords, the circumstances of this case are different from those of *Wilson* v. *Waddell*, decided by your Lordships on the 1st of December, 1876, on an appeal from the Court of Session in Scotland.

The facts of this case have been brought out very clearly and distinctly in the opinion which has been expressed by my noble and learned friend opposite, Lord Penzance. The contention of the appellants at your Lordships' bar was that the new channel was sufficient for carrying off the water, had it not been for the result of an exceptional rainfall, against which it was contended that there was no duty imposed upon them to provide. But, as has been pointed out by his Lordship, this matter was submitted to the jurors by the judge who presided at the trial, and they found that the damage was caused by the insufficiency of the new channel, and that the diversion of the stream had not been properly executed. I think the result expressed by his Lordship is fully supported by the findings of the jury, to which he has referred.

Judgment appealed from affirmed, and appeal dismissed, with costs.

Lord's Journals, 27th July, 1877.

Solicitors for appellants, GREGORY, ROWCLIFFES & Co.

Solicitor for respondent, J. R. MUSGRAVE.

CLEGG ET AL. v. DEARDEN.

(12 Q. B. 576. Queen's Bench, 1848.)

[1] **Working across boundaries on the dip into lower mine.** The owner of a coal mine excavated to his boundary as he had the right to do; but continued the excavation wrongfully beyond the boundary into the neighboring mine, leaving an aperture in the coal of that mine through which the water passed: *Held*, that the defendant was liable for the original trespass in breaking into the mine, but not in an action on the case for *omitting to close up the aperture*, although a continuing damage resulted from its being unclosed. If it was defendants' duty to

[1] *Baird* v. *Williamson*, 4 M. R. 368; *Bannon* v. *Mitchell*, 2 M. R. 108.

close it, and an action lies for omitting to close it, the declaration should allege the duty specifically; plaintiff can not recover on a count stating merely that the defendant made the aperture and omitted to close it.

Continuing injury after former recovery. If damages have been awarded on a former proceeding against the defendant for making the aperture and letting in the water, the plaintiff can have no further recovery for damages resulting from the defendants' neglecting to close the opening since the original award.

Case. The declaration stated: That defendant at the time of the committing, etc., was possessed of and entitled to a certain coal mine lying and being under certain land in the county of Lancaster, and contiguous and next adjoining to a certain other coal mine in the said county, formerly in the possession and occupation of one James Starkey, but at the time of the committing, etc., and now, in the possession and occupation of the plaintiffs under a demise heretofore to them thereof made by the said James Starkey; and that, while the last mentioned coal mine was in the possession and occupation of the said J. S., to wit, on the 31st of December, 1838, the defendant broke and entered the said last mentioned coal mine, and dug out of the same divers large quantities of coal, to wit, etc., and took and carried away the same, and thereby then made and caused a large, wide and extensive aperture and excavation into the said last mentioned coal mine from the said coal mine of the defendant; and, although defendant, after plaintiffs became possessed of the said coal mine, etc., to wit, on 1st August, 1841, was requested by plaintiffs to fill and stop up the said aperture and excavation so made by defendant as aforesaid, yet defendant, well knowing, etc., but contriving, etc., to wit, on 8th August, 1841, and on divers other days, etc., and while the said coal mine was in the possession and occupation of plaintiffs as aforesaid, wrongfully and injuriously kept and continued, and caused to be kept and continued, for a long and unreasonable time, to wit, thence hitherto, the said aperture and excavation open and unfilled up, and, during all the time aforesaid, has neglected and refused, and still neglects and refuses, to fill and close up the same.

Whereby, and by reason of the continuing and keeping by the defendant the said aperture and excavation so open and unfilled up as aforesaid, divers large quantities of water which had

gathered and collected, and were then standing in the said coal mine of defendant next immediately adjoining to the said coal mine in the possession and occupation of plaintiffs, afterward and after plaintiffs became possessed of the said last mentioned coal mine, to wit, on the day and year last aforesaid, burst through, and then ran and flowed from and out of the said coal mine of the said defendant through the said aperture and excavation, in and upon, into and over the said coal mine then in the possession and occupation of plaintiffs, and inundated and greatly damaged and injured the same; and the said large quantities of water have thence hitherto run and flowed, and still continue to run and flow, from and out of the said coal mine of defendant, through the said aperture and excavation, in, upon, into and over the said coal mine in the possession and occupation of plaintiffs as aforesaid; whereby, and by reason of the said large quantities of water inundating, etc., and still continuing to run, etc.; damage that plaintiffs and their servants have been hindered from working the mine, etc., and plaintiffs have been forced to expend, and have expended, money, to wit, etc., in pumping out the water and putting the mine into a fit state for working, etc.

Pleas. 1. Not guilty. Issue thereon. 2. That the causes of action did not accrue within six years. Verification. Replication, that the causes of action did accrue within, etc.; conclusion to the country. Issue thereon. 3. That the mine secondly above mentioned was not, at the time of the committing, etc., in the possession or occupation of plaintiffs in manner, etc.; conclusion to the country. Issue thereon. 4. That defendant was not requested by plaintiffs to fill and stop up the said aperture, etc., in manner, etc.; conclusion to the country. Issue thereon. 5. That heretofore, to wit, on the 16th February, A. D. 1841, one Hugh Hornby, clerk in the court, etc. (Exchequer), impleaded defendant in an action of trespass on the case, and therein declared that, before and at the time of the committing of the grievances thereinafter mentioned, one James Starkey held and enjoyed a certain close, etc., called the Holmes, etc., and a certain other close, etc., parcel of the bed of the river Roach, etc., as tenant to the said Hugh Hornby, the reversion thereof in his demesne as of fee, etc., then belonging

to and vesting in the said H. H.; and that defendant did, whilst the said J. S. held, etc., as tenant, etc., as aforesaid, and whilst the said reversion thereof belonged to and was vested in H. H., to wit, on 1st January, A. D. 1820, and on divers others, etc., wrongfully and unjustly, without the leave, etc., and against the will of H. H., break and enter into the said closes, etc., and then made divers, to wit, 100 holes and 100 excavations in the strata and mines by and in the said closes under the surface thereof, and then dug and excavated divers, to wit, 100,000 tons of coal and 100,000 cart loads of earth and soil from and out of the said closes in, under and below the surface thereof, and then carried away the same, and thereby caused divers, to wit, two acres of the roofs and earth, soil and coal and land of the said two closes, immediately above, about and around the said holes and excavations, to fall in, upon, about and in the said closes, and then and thereby choked up, damaged and spoiled divers, to wit, 500,000 tons of coal and 500,000 tons of earth and soil of and in the said closes, and thereby caused divers drains and water courses and quantities of water to empty themselves, run, escape and flow unto and into the said two closes under and below the surface, flooding, injuring and spoiling the coal, strata, earth and soil of the said two closes in, under and beneath the surface thereof, and thereby also then injured the said closes, and greatly thereby also then weakened and undermined and rendered insecure the surface of the said closes, and permanently injured the reversionary estate and interest of the said Hugh Hornby of and in the said two closes and the mines, etc.; by reason of which, etc. (averring damage to Hornby's reversionary estate). That defendant pleaded not guilty and other pleas, and issues were thereupon joined; and such proceedings were thereupon had that afterward, etc. The plea then alleged that Hornby's action came on for trial at the Liverpool August assizes, 5 Vict.; and thereupon, by a rule then made at the said assizes with the consent of Hornby and defendant, etc., and of Starkey, who thereby consented to become a party to the rule, it was ordered that the jury should find a verdict for Hornby, damages £10,000, subject to be reduced, etc., or a verdict for defendant, or a nonsuit entered, according to the award aftermentioned;

and that the cause, and all matters in difference between Hornby and defendant, and between Starkey and defendant, should be referred to the award, etc. (reference, in ordinary form, to a barrister); and that the persons composing a joint partnership or mining company called the Heywood Colliery Company, or the Captain Fold Colliery, might, if they should think fit, and certify their desire by writing, etc., become parties to the rule as to any alleged injury to them, or any of them, by any of the matters alleged in the declaration.

The plea then averred that the persons composing the said partnership, who are the now plaintiffs in this suit, certified their desire accordingly; that the arbitrator took upon him the arbitration, and made and published his award, and thereby ordered the damages to be reduced to £436 19*s.* 3*d.*, and awarded that Starkey had sustained damages by the matters in the said declaration alleged, and assessed such damages at one shilling, and further awarded that the said persons composing the said partnership had suffered damages in respect of certain injuries to them by the matters in the said declaration alleged, to the amount of £204 8*s.*, and he awarded that that sum should be paid to them, and the sum of one shilling to Starkey, by the defendant on or before, etc. The plea averred that defendant did pay the several sums to the respective parties, as awarded, and that they accepted and received the same, after the making of the award; and it averred, also, the identity of the last mentioned James Starkey with the Starkey mentioned in the present declaration, and of the Heywood Colliery Company with the plaintiffs in this suit; and it alleged that the coal mine in the present declaration secondly mentioned was and is parcel of the two closes mentioned in Hornby's declaration, and of the coal strata, etc., of the said two closes so flooded, etc., as therein mentioned; "and that the said breaking and entering the said coal mine in the said declaration of the now plaintiffs mentioned, and digging out of the same the said quantities of coal therein mentioned, and taking and carrying away the same, and making and causing the said aperture and excavation into the said last mentioned coal mine from the said coal mine of the defendant, were and are part and parcel of the grievances in the said declaration in the said action

of the said Hugh Hornby, and in the said award" "mentioned, and in respect whereof such damages were awarded and paid as aforesaid to the said Hugh Hornby, James Starkey, and the said persons composing the said company and the now plaintiffs, respectively, and were so awarded and paid as aforesaid for and in respect of such damages as aforesaid, and all consequential damages to arise or happen in consequence thereof, to the said H. H., J. S., and the said company and now plaintiffs, respectively, or any persons thereinafter claiming any interest under them, or any of them, respectively." Verification.

Replication to plea 5. That plaintiffs commenced their action, "not for the grievances in that plea attempted to be justified, but for that the defendant, after the commencement of the said action" at the suit of H. H., and after the making of the said award, to wit: "on the day and year in the said declaration mentioned, and from the making of the said award, thence hitherto kept and continued the said aperture and excavation so made by the defendant into the said coal mine of the plaintiffs below the surface of the earth, as in the declaration mentioned, opened and unfilled up and unclosed, and after the making of the said award and thence hitherto, wrongfully suffered and permitted the said large quantities of water which had gathered and collected, and were then standing in the said coal mine of the defendant, as in the said declaration mentioned, to run and flow through the said aperture and excavation so made by the defendant as aforesaid, in, upon, into and over the said coal mine of the plaintiffs, and to flood and inundate the same, and which, but for the making of the said aperture and excavation by the defendant as aforesaid, and digging out and carrying away the said quantities of coal therefrom, and keeping and continuing the same by the defendant, thence hitherto open, unfilled up and unclosed would not have so run and flowed as aforesaid and flooded and inundated the said coal mine of the plaintiffs—and that by reason of the premises, and of the defendant neglecting to divert and otherwise drain off or dispose of the said large quantities of water which had so collected and accumulated in his said coal mine as aforesaid, so as to prevent the same from flowing through the said aperture and excavation so made

by the defendant as aforesaid, and thus flooding and inundating the said coal mine of the plaintiffs, the said large quantities of water have, from the time of the making of the said award, and thence hitherto, continued to run and flow, and at the time of the commencement of this suit still ran and flowed, and still do run and flow from and out of the said coal mine of the defendant in, upon and over the said coal mine in the possession and occupation of the plaintiffs, as aforesaid, in manner and form as the plaintiffs have in their said declaration above complained against the defendant, being other and different grievances than those in the said last plea of the defendant attempted to be justified." Verification.

Pleas to the new assignment.

1. Not guilty—issue thereon. 2. That Hornby impleaded defendant in such action as in the last plea to the present declaration mentioned, and such proceedings were had thereon, and the cause and all matters, etc., were so referred, and such persons became parties, etc., and such award was made and damages awarded and paid by defendant to the respective parties, as in that plea mentioned, and that the persons to whom the damages were paid were respectively such persons as in that plea in that behalf alleged. And "that the said damages were so awarded and so paid as aforesaid for and in respect of the matters in the declaration in the said action at the suit of the said H. H. alleged, and the injuries to the said persons in the said award mentioned by the matters in the said declaration in the said action at the suit of the said H. H. alleged, and for and in respect of all consequential damages thereafter to arise or happen by reason of any of the matters or injuries in the said declaration in that cause alleged to any of the said parties to this said reference other than the said defendant, and all persons thereafter claiming any interest under them, or any of them respectively.

And the defendant further says that, though true it is that the grievances above newly assigned were grievances arising or happening after the commencement of the said action at the suit of the said H. H., and after the making of the said award, yet that the said grievances so newly assigned, and each and every of them, were and are merely and only consequential damages, arising or happening to the plaintiffs by

reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference and injuries so referred as aforesaid, and in respect of which such damages were so awarded and paid as aforesaid." Verification.

Replication to the last plea to the new assignment. That the award in that plea mentioned was in the words, etc., following: The replication then set it forth as it is, in substance, stated above (p. 92), and proceeded: Without this, that the said grievances so above newly assigned were merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference and injuries so referred as aforesaid, or any or either of them, or any part, or in respect of which the said damages were so awarded and paid as aforesaid, in manner and form as in the said last plea is alleged. Conclusion to the country. Issue thereon.

The present cause was tried at the Liverpool spring assizes, 1845, when a special verdict was found.

The verdict stated that the plaintiffs were owners of a colliery called the Captain Fold colliery, from 1830 to the commencement of this suit; that in 1839 James Starkey, by indenture, demised to the plaintiffs all the mines and beds of coal, etc., lying within or under the tenement and estate and demised lands of Starkey, called the Heywood Hall estate, for 99 years; that the Heywood Hall estate comprised the lands from the west end of a tunnel at Captain Fold (shown in a plan annexed) north-west to the defendant's colliery on the opposite side of the river Roach, and included that river and part of certain lands called the Holmes (shown in the plan), and comprised the drawing road and water level from the said tunnel to the Holmes (also shown in the plan). The verdict then went on as follows:

That before the making of the said lease to the plaintiffs by James Starkey, the defendant had, by his servants, trespassed into that part of the Heywood Hall estate leased to the plaintiffs which adjoined the defendant's mine (and marked or shown on the said plan, etc.), "and got the coal, there marked," etc., "out of the Heywood Hall estate, and in getting that coal had

made an aperture and excavation into the coal of the Heywood Hall estate at the place marked A, at the north-west end of the water level before mentioned (in the said plan marked," etc.), "which was so leased by the said J. S. to the plaintiffs; that afterward and before the year 1839, the roof of the said excavation made by the defendant into the Heywood Hall coal, fell in by reason of his having got the coal and removed the pillars there, and the interstice became filled with water; that afterward, in 1840, the plaintiffs drove a level from the said tunnel into and along the Heywood Hall estate coal, as shown," etc. (in the plan), "in a direction toward the defendant's mine, and until they came to a point, A, being at a distance of from six to ten yards short of and within their own boundary, when the waters which had collected in the defendant's mine flowed through the excavation and aperture at A aforesaid, which had been made in the Heywood Hall estate as aforesaid; and the defendant has not hitherto stopped or filled up the aperture, or done anything to prevent the flowing of the water from his mine through and into the said aperture and excavation made by him in the Heywood Hall estate; neither the plaintiffs nor the said James Starkey nor the said Hugh Hornby, clerk, had any knowledge of the trespass so as aforesaid committed by the said defendant, or of the aperture and excavation so made as aforesaid, or of the said roof having so fallen in and the interstice having so become filled with water, until the plaintiffs, in driving their said level, met the excavated workings of the defendant at the said point A. That the defendant has not pumped any water out of his mine adjoining the Heywood Hall estate since 1840, and has ceased to work his own mine since 1842. That plaintiffs' and defendant's mines are on the same bed of coal, the defendant's on the rise, and the plaintiffs' on the dip; and that it is the custom in working the coal mines for the owner of the mine or bed on the rise to work up to the boundary of his coal on the dip, and for the owner of the mine or bed on the dip to protect his own mine from the influx of water from the mine or bed on the rise, by leaving a sufficient barrier of coal on his own side of the boundary on the rise; and that the said distance of from six to ten yards left by the plaintiffs beyond the end of their water level afore-

said, would have been a sufficient barrier for the purpose aforesaid, if the defendant had not by his said servants made the aperture and excavation aforesaid. That the water, after the plaintiffs so drove the said water level, continued to flow from the defendant's colliery into the said water level at the place marked A, through the said aperture and excavation, and thence ran along the water level to the said tunnel, and flooded the coal at Captain Fold colliery, between the said drawing road and water level, which said continued flowing of the water through the said aperture and excavation so made by the defendant as mentioned in the declaration in the action brought by H. H., clerk, as hereinafter mentioned, and the continued running thereof along the water level and flooding the coal as aforesaid, are the grievances complained of in this action. That in consequence thereof the plaintiffs, in order to win and get the said coal of the Heywood Hall estate, have ever since up to the time of the commencement of this action, been obliged to pump out and discharge, and have pumped out and discharged the said water so flooding the coal at Captain Fold colliery along the said tunnel, and thereby have incurred considerable expenses in pumping the water out of the said last mentioned colliery beyond what they theretofore had incurred, and which said expenses are sought to be recovered in this action."

The verdict then stated that on 16th February, 1841, Hornby brought his action, and proceedings thereon took place as mentioned in the 5th plea to the present declaration. That, before and at the time of the committing of the grievances mentioned in Hornby's declaration, Hornby was seized of the closes therein mentioned, and Starkey, tenant thereof as in that declaration mentioned, Hornby being mortgagee, and Starkey his mortgagor in possession; and that the said closes respectively formed part and parcel of the Heywood Hall estate; and that the plaintiffs' coal mine mentioned in the within declaration is underneath the surface of the closes mentioned in the declaration in the action brought by H. H., and parcel of the same, and of the coal strata mentioned in that declaration. The verdict further stated that the proceedings as to the reference took place, and the award was made, and the damages paid to the parties respectively, as in the 5th plea

mentioned; and that the coal mine in the present declaration secondly mentioned was, at the time of the committing of the grievances therein complained of, to wit, from 8th August, 1841, until the commencement of this suit, in the possession and occupation of the plaintiffs as alleged by them on the present record.

The verdict then submitted, in the usual form, the questions whether or not, upon the whole matter, the defendant is guilty of the grievances above laid to his charge, as in the declaration and new assignment specified; whether or not the causes of action, or any of them, accrued within six years next, etc.; and whether the grievances newly assigned "were or were not merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference and injury so referred as aforesaid, or any or either of them, or any part thereof, or in respect of which such damages were so awarded and paid as aforesaid."

The special verdict was argued in Easter term, 1848.

HOGGINS, for the plaintiffs. As to the first issue. The substance of the complaint is, that the defendant dug into the plaintiffs' soil and thereby made an aperture, which not being stopped, the waters running from the defendant's mine flow into that of the plaintiffs. The question is, not whether the grievances legitimately result from the premises as stated in the declaration, but whether, as stated, they are not such as the plaintiffs may obtain a verdict for on a plea of not guilty. On the issue, as joined, the finding must be for the plaintiffs, even if the consequence should be a motion in arrest of judgment. [WIGHTMAN, J.—The aperture is on the plaintiffs' land; how could the defendant fill it up without being liable to an action of trespass? PATTESON, J.—If a man breaks my windows so that the rain enters, can I have an action against him for not coming in and mending them? Lord DENMAN, C. J. Did the defendant, by his first trespass, give himself the privilege of entering upon the plaintiffs' land?] The last case bearing directly on this subject is *Firmstone* v. *Wheeley*, 13 Law J. N. S. Exch. 391, Trin. T. 1844, where the declaration in

case alleged that the plaintiffs and defendants had adjoining coal mines, that the defendants had trespassed on the plaintiffs' mine, and dug large quantities of coal therefrom; that afterward water had flowed into defendants' mine, which would necessarily inundate that of plaintiffs unless a sufficient barrier were provided; that defendants, by their trespasses, had removed that which would have been a sufficient barrier and the only one, and they having done so, it became their duty to provide, and take means for preventing the water collected in defendants' mine from flooding the mine of the plaintiffs; and the breach was that the defendants neglected to make any provision, and by reason thereof water ran from their mine into the plaintiffs'. On demurrer, the Court of Exchequer seems to have thought the breach well laid; and ALDERSON, B., said: "If the defendants alter the plaintiffs' barrier, it may become their duty to take care that the plaintiffs sustain no injury from the alteration. Suppose you have water upon your land, and by not taking proper precautions it flows upon my land; are you not liable? A man makes a hole in the wall of his neighbor's house; may he afterward fill a reservoir, and let the water flow in upon that house? [PATTESON, J.—The party who has to prevent the injury must use the means within his own land.] You allege here that the defendants were bound to fill the aperture on your land. The injury is not alleged as resulting merely from the omission to do that; the words are "Whereby, *and* by reason of the continuing," etc., of the said aperture, etc. The new assignment states that the defendant wrongfully permitted water which had collected in his mine to run into the mine of the plaintiffs. [WIGHTMAN, J.—The new assignment can not suggest a different cause of action from that stated in the declaration.] Even if the defendant would be a trespasser in repairing, he is liable for the original grievance. [WIGHTMAN, J.—But your complaint, as stated, is of his not doing what he has no right to do.]

The difficulty thrown upon him is the consequence of his own act. [WIGHTMAN, J.—At any rate you do not charge it so. PATTESON, J.—How can you say there is a continuing in this case? Your claim is as if a man broke another's leg, and an action were brought against him for not setting it.]

In *Thompson* v. *Gibson*, 7 M. & W. 456, the defendants had erected a building which obstructed a market, and they were held liable for continuing the nuisance, though they had no right of entry upon the land where the building stood. [WIGHTMAN, J.—There the complaint was that they had not removed something which they had placed on the land.] This case is the same in principle. It does not rest with the defendant to say that he would have been a trespasser in closing the aperture. The plaintiffs might have consented. [PATTESON, J.—The principle as to works above and works under ground is the same; and there is no instance of a recovery, first for breaking down a wall, and then for not rebuilding it.] In *Booth* v. *Oliver*, 1 Roll. Abr. 104. tit. *Action sur Case*, (K.) pl. 3 (cited in *Hudson* v. *Nicholson*, 5 M. & W. 437, 441,) it is said that, in an action on the case, if the plaintiff declares that the defendant threw down and prostrated a wall which divided the plaintiff's and defendant's houses, and also pulled away the tiles of the plaintiff's house, *per quod* the water comes into plaintiff's house and rots the timber thereof, the action lies, for, although he might have an action of trespass for pulling off the tiles, yet this action lies also, inasmuch as it is alleged that, by reason thereof, the timber of the house was rotted.

In *Westbourne* v. *Mordant*, Cro. Eliz. 191, where the declaration, in case, alleged that the defendant put stones into a brook and thereby stopped the water, so that it overflowed the plaintiff's meadow, it was objected that the nuisance, by throwing in the stones, was laid before the plaintiff's title commenced; but the court held that the nuisance might not be till the water ran over, and that the action was well brought. [PATTESON, J.—In *Hudson* v. *Nicholson*, the declaration was held to be in trespass, though informal. The case in Rolle was not a case of continuing. ERLE, J.—It is consistent with that authority that there might be an option only. WIGHTMAN, J.—Your complaint is, not of a continuing, but of a neglecting to fill up; that is the charge; the rest is gravamen. It is as if the complaint in the case from Rolle had been that the defendant did not replace the tiles. PATTESON, J.—How can a man be said to continue that which he can not prevent from continuing? Lord DENMAN, C. J.—The plaintiffs allege

that they licensed the defendant by their request; and, that being so, they may suggest that he was chargeable with continuing, independently of the authority of *Thompson* v. *Gibson*, 7 M. & W. 456. The plaintiffs, however, might have done what, as they say, ought to have been done by the defendant, and charged the expense to him.] (MARTIN, for the defendant, observed that the request was traversed on the record and not affirmed by the verdict.) If the verdict is imperfect, the plaintiffs are willing that the cause should be re-tried to settle the undecided question. But, on the whole case, a request sufficiently appears. [WIGHTMAN, J.—What evidence is there of it?] The bringing of the action. [WIGHTMAN, J.—That does not prove a request as averred. If there is no evidence of it, we might, perhaps, consider the verdict as amended according to the fact, and nothing will then turn on the request. (a)]

The question on the statute of limitations is substantially the same as the question on the first issue.

As to the issues upon the new assignment, trespass might have lain for the act which originally caused the injury; but if there is a resulting damage long subsequent, case lies for that: *Roberts* v. *Read*, 16 East, 215; *Gillon* v. *Boldington*, Ry. & M. 161; otherwise there would be no compensation for that injury; and in fact none was given by the award.

MARTIN, *contra*.—The plaintiffs can maintain no action for the injury here alleged ; or if they can, their right of action has already been satisfied by the proceedings on the arbitration. The declaration in Hornby's action necessarily embraced both the present and the future permanent injury.

(a) It appears that judgment was given on the supposition that there was to be a verdict for the defendant on the fourth plea, and for the plaintiffs on the second and third. No amendment, however, was ultimately agreed to. Error, on the judgment in this court, was afterward brought in the Exchequer Chamber, when the difficulty was pointed out from the bench, and it was said that there ought to be an amendment of the verdict, or a *venire de novo*. Finally, no judgment was given in the Exchequer Chamber, the parties agreeing that proceedings should be stayed, that the plaintiffs should give a release to defendant, and that no costs should be paid on either side.

That action and all matters in difference between Hornby and the defendant and Starkey and the defendant, were referred to arbitration, with liberty to the now plaintiffs to become parties to the rule of reference as to any alleged injury to them by any of the matters stated in the then declaration. They did become parties, and damages were awarded and paid. The question then is whether the defendant was bound afterward to go upon the plaintiffs' land and fill up the aperture. The plaintiffs assume that the defendant denies it, and not acknowledging any other default or misfeasance, he pleads not guilty.

It results from all the cases (nor does the judgment of POLLOCK, C. B. in *Firmstone* v. *Wheeley*, 13 Law J., N. S. Exch. 361, go any further) that, where a man does on his own land something which, for want of prevention on his part, becomes injurious to the land of another, he is liable to an action, but no case shows that if the original injurious act has been done on another's land the doer of it is bound to make good the injury upon that land or else abide the ultimate consequences: *Gillon* v. *Boddington*, Ry. & M. 161, (explained in *Howell* v. *Young*, 5 B. & C. 259, 267, 268, by HOLROYD, J., who referred to *Fetter* v. *Beale*, 1 Salk. 11), is consistent with all the authorities, if it be understood that the injurious act of excavation was done upon the land of the dock company themselves, and that they were held liable as for a nuisance continued on their own premises and finally producing injury to the plaintiff, for which he then sued. If otherwise understood, *Gillon* v. *Boddington* is not law nor borne out by *Roberts* v. *Read*, 16 East, 215. There the cause of injury was a digging, not on the plaintiff's soil but in the soil of the street. No action could have lain till a specific injury to the plaintiff resulted from that act, which injury was the falling of the wall. In *Hodsoll* v. *Stallebrass*,[1] 11 A. & E. 301, 305, where it was held that damages might be given for a bodily injury to the plaintiff's servant in respect of future disability, LITTLEDALE, J., said: "It is argued that a fresh action might be brought from time to time, but that is not so, the action being founded, not upon the damage only, but upon the unlawful act and the damage. Without the

[1] See *Wordsworth* v. *Harley*, 1 B. & Ad. 391, 393, dictum of BAYLEY, J.

special damage this action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act and fresh damage."

In *Thompson* v. *Gibson*, 7 M. & W. 456, it was perhaps inaccurately argued that the defendants were not liable because they would be guilty of a trespass in removing the nuisance from the land of the third party on which it had been erected; but PARKE, B., in answering the argument, clearly addresses himself to the case of a positive nuisance, which if it continue may be abated by the party injured. *Booth* v. *Oliver*, 1 Rol. Abr. 104, *Action sur Case* (K.) 3, was cited in *Hudson* v. *Nicholson*, 5 M. & W. 441, to show that case might be brought for the injury on the plaintiff's land, and so it might on the facts there shown, since one part of the act was the breaking down a party wall between the houses of plaintiff and defendant, for which of course case would lie and the rotting of the timber on the plaintiff's land was consequential to that. [PATTESON, J.—The words are, "uncore cest action gist *auxi*, entant que est allege que per reason de ceo," (the pulling away the plaintiff's tiles, which would have been the foundation for an action of trespass) "le tymber del mese fuit rott."] It must be admitted that at one time the line was not strictly drawn. [PATTESON, J.—How would the action be brought, in the case supposed by ALDERSON, B., in *Firmstone* v. *Wheeley*, 13 Law J., N. S. Exch. 362, of the defendant making a hole in the wall of plaintiff's house, and afterward filling a reservoir so that the water escapes through the hole?] It would be brought for the positive act of collecting the water. However, nothing was decided in that case. [WIGHTMAN, J.—I understood you to distinguish between continuing a positive nuisance on the plaintiff's land without removal, and not repairing an injury resulting from a state of things caused by the defendant on the plaintiff's land.] Yes; in the latter case all the damages must be recovered in the first action for the injury; the former is the case of a positive continuing injury. That distinction explains *Westbourne* v. *Mordant*, Cro. Eliz. 191. [WIGHTMAN, J., referred to *Holmes* v. *Wilson*, 10 A. & E. 503.]

In that case the defendant had made erections on the plaintiff's land, and continued them there, actually using

them. [WIGHTMAN, J.—The defendant could not have removed without committing a trespass.] It might there have been fairly answered that they had brought that difficulty on themselves. In *Taylor* v. *Stendall*, 7 Q. B. 634, the defendant had injured a wall on the plaintiff's land and it was held that he could not justify going upon the land for the purpose of repairing.

It is clear that Hornby could not have maintained this action, any more than the plaintiff in *Fetter* v. *Beale*, 1 Salk. 11, could have had an action for fresh injury arising from the original battery, since the reference here comprehended all injury accruing from what had been done, nor could Starkey, or the plaintiffs, who were parties to the reference, and recovered damages therein. If Hornby and Starkey have suffered no actionable damage since the time of the reference, it would appear by the verdict that the plaintiffs never sustained any of the kind now complained of, for they took the land after that time and of course took it as it stood.

The new assignment contains no allegation of request; as to that, therefore, if the request be material, the defendant must succeed.

HOGGINS, in reply: The ground of complaint is, in effect the turning on water to the land of the plaintiffs. [PATTESON, J.—That is not the complaint.] It is so in the new assignment. [PATTESON, J.—That can not go beyond the declaration.] There is no demurrer. No argument for the defendant arises from Hornby having recovered. A feoffee may sue for a nuisance first created in the time of the feoffor: *Penruddock's Case*, 5 Rep. 100 b. So the original nuisance, if continued, is a substantive cause of action, in whatever hands the premises causing the nuisance may be: *Rosewell* v. *Prior*, 2 Salk. 460, commented upon in *Thompson* v. *Gibson*, 7 M. & W. 461.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (June 2nd) delivered the judgment of the court.

This was an action on the case for wrongfully keeping and continuing open an aperture made by the defendant from a mine belonging to him, into a mine which, at the time of

making the aperture, belonged to James Starkey, but which he afterward demised to the plaintiffs, who were in the occupation of the mine before and at the time of the bringing of the action, by means whereof quantities of water continued to flow from the defendant's mine into the plaintiffs'. The defendant pleaded not guilty, and other pleas, one of which was a special plea stating in substance the bringing of a former action on the case by Hugh Hornby, the owner of the plaintiffs' mine, J. Starkey being in possession as his tenant, against the defendant, for injury to his reversion by breaking and entering his mine and making the aperture in question, and thereby causing the water to flood the coal strata, and that the cause and all matters in difference between the said H. Hornby and the defendant, and between Starkey and the defendant, were referred to an arbitrator, with liberty for the present plaintiffs to be parties to the reference as to any injury to them by reason of any of the matters alleged in that suit; that the plaintiffs did become parties to that reference, and that the arbitrator awarded separate sums to H. Hornby, J. Starkey and the plaintiffs for the damage they had sustained; that these sums were paid, and that they were awarded and paid in respect of all consequential damages arising from the matters complained of in the action by H. Hornby.

To the special plea the plaintiffs new assigned that they brought their action for keeping and continuing the aperture open; after the award to this new assignment the defendant pleaded, admitting that the grievances complained of in the new assignment happened after the award, that they were only consequential damages arising from the matters alleged in H. Hornby's action, and in respect of which damages were awarded and paid as before stated.

To this plea the plaintiffs replied, setting out the award, and traversing that the grievances newly assigned were merely consequential damages as alleged in the plea.

Upon the trial the jury found a special verdict, by which it appeared that, before and in 1839, J. Starkey was mortgagor in possession and H. Hornby, mortgagee, of that part of the plaintiffs' mine into which the aperture was made; that, in that year, Starkey demised to the plaintiffs the premises in question; that, before that demise, and whilst Starkey was

mortgagor in possession, the defendant trespassed upon the mine in Starkey's possession, by breaking into it from his adjoining mine and taking the boundary coal in Starkey's mine to the extent of several yards; that in 1840 the plaintiffs proceeded to work the mine under the demise from Starkey, and when they got within from six to ten yards of the boundary between their mine and the defendant's, they came to the excavation made by the defendant, and the water from his mine came in upon them, and continued to flow in upon them to the time of the plaintiffs bringing their action. It also appeared that the plaintiffs' and defendant's mines were on the same bed of coal, but that the defendant's workings were on the rise, and the plaintiffs' on the dip, and that it is the custom for the miners on the rise to work to their boundary, and for the miners on the dip to leave a barrier of from six to ten yards in their mine to protect them against the water from the mine upon the rise.

The facts of the case are fully stated upon the special verdict; but this short reference to them and to the pleadings is sufficient for the purpose of our judgment.

The question is, whether, upon the pleadings, and the facts found by the jury, the verdict upon not guilty, and the replication to the plea to the new assignment, should be found for the plaintiffs or for the defendant; it being agreed that the issues upon the 2nd and 3d pleas should be entered for the plaintiffs and the issue upon the 4th plea for the defendant.

We are of opinion that the defendant is entitled to have the verdict entered for him upon not guilty, and upon the issue upon the replication to the plea to the new assignment.

The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiffs' mine.

By the custom, the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiffs' side of the boundary and within their mine. It is not as in the case of *Holmes* v. *Wilson*, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs; nor is it a continuing of something placed upon the land of

a third person to the nuisance of the plaintiffs, as in the case of *Thompson* v. *Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance, nor is it the breach of any legal duty.

It was, however, contended on the part of the plaintiffs that, admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made; and the case of *Firmstone* v. *Wheeley*, in the Exchequer, in Trinity term, 1844, reported in the 13th volume of the Law Journal Reports, was cited. The court, however, in that case, did not determine that there was any such duty or obligation; and if it had, that case would not be an authority applicable to the present, as the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty if it exists, but upon the omission to fill up the aperture made by them in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty.

The question that arises upon the new assignment is not very different from that which arises upon the plea of not guilty. The plaintiffs have already recovered damages against the defendant for making the aperture; and the omitting to enter the plaintiffs' mine and fill up that aperture, in consequence of which the water continued to flow from the defendant's mine into the plaintiffs', affords no distinct ground of action, as for the continuance of a trespass or a nuisance; the flowing of the water, and the damage thereby to the plaintiffs, is merely consequential to the making the aperture; and for that the plaintiffs have already received compensation. The

defendant, therefore, in our opinion, is entitled to have the verdict entered for him upon the issue taken upon the replication to the plea to the new assignment.

Judgment accordingly.

HALDEMAN ET AL. v. BRUCKHART.

(45 Pennsylvania State, 514, B. & W. L. C. 784. Supreme Court, 1863.)

[1] **Spring drained by mine.** A mine owner who in due course of mining taps and drains the underground channels supplying a spring upon adjoining land, without malice or negligence, gives no right of action to the party whose spring is thus destroyed.

Such loss is damnum absque injuria. A mine owner may not negligently nor maliciously (in violation of the maxim *sic utere tuo*) divert even an unknown subterranean stream, but he may drain, mine or quarry in the course of enjoyment of his own land, though in so doing he interfere with the flowage of water in hidden, unknown, underground channels.

[2] **Underground currents not water courses.** Neither water flowing by percolation nor by undefined subterranean channels can be treated as a water course.

Error to the Common Pleas of Lancaster County.

This was an action on the case, brought September 28, 1861, by Henry Bruckhart against Edwin Haldeman and Paris Haldeman, for diverting and destroying a spring of water on his land.

The material facts of the case were these: The plaintiff below owns a tract of land of sixteen acres, upon which he and his family reside; on which land, adjacent to his dwelling, there was a large spring of water, which was sufficient to supply all the uses of his family, and was never known to go dry, or be diminished in volume, until the fall of 1860. In 1847, defendants bought an adjoining tract of about five acres, for the purpose of mining iron ore, about three hundred and thirty feet distant from the spring. Some ten years since they dug a pit to mine iron ore, and have been mining ever

[1] *Chadwick* v. *Coleman*, 80 Pa. St. 81; *Post* SURFACE SUP: ORT; *Trout* v. *McDonald*, 83 Pa. St. 144; *Post* LEASE.

[2] *Contra* as to sunken stream: *Barnes* v. *Sabron*, 4 M. R. 673.

since. They commenced by pumping the water out of the pit with horse power. In 1858 or 1859 they procured an engine with steam pump, and in the fall or spring of 1860, two steam pumps were put up, and when this steam power is in full operation plaintiff's spring is entirely dried up. The spring is affected and diminished in a short time after they commence pumping, but neither the horse power nor the first steam pump diminished the spring. It was only when the largely increased power was brought into play that the spring was affected.

The pit is forty feet deep, and about forty yards across; the bottom is an oval, fifty by twenty feet; within forty-eight hours after the pumping ceases the spring fills, and the water in the spring is at its natural flow. It requires from six to eight feet of water in the bank before the spring flows.

There are three distinct streams coming into this pit; one from the northwest, four or five inches in diameter. Plaintiff's spring lies southeast from that. The volume of water pumped out of the pit exceeds largely the natural flow of plaintiff's spring. Other springs are similarly affected by the pumps of defendant. A number of coal pits are dug in that vicinity—eighteen or twenty—none of which, however, affected the water of this spring.

The defendants requested the court to instruct the jury:

1. That the owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against one who, in carrying on mining operations on his own land, in the usual manner, drains away the water from the land of the first mentioned owner, and lays his spring dry.

2. The owner of a spring where the supply is derived through his neighbor's land has only an imperfect right, a right subordinate to the paramount rights of such neighbor; and when the fair enjoyment of these paramount rights requires its destruction, he is bound to submit to the deprivation.

3. Mining iron ore on their own land by the defendants to supply their furnace is a proper use of their own property, and only a fair enjoyment of their paramount rights; and if thereby the subterranean water supplying the plaintiff's

spring is diverted or destroyed, and a loss arises, it is *damnum absque injuria*, and the plaintiff can not recover.

4. There is no evidence of malice, negligence or misconduct on the part of the defendants; and the whole evidence in the cause does not prove the existence of such a well defined subterranean water course, in the land of the defendants, as will enable the plaintiff to maintain an action against the defendants for unavoidably diverting or destroying the same, and thereby laying the plaintiff's spring dry, while carrying on their mining operations, and the verdict must be for the defendants.

The court below charged the jury as follows: "The difficulty in this case, numerous as are the authorities cited, is not in the law, but is in regard to the facts, or rather the fact, as to the character of the supply of water to the plaintiff's spring, for the alleged injury to which he has brought this action. Was this spring supplied by a general percolation or oozing of the water through the soil beyond and above it, or by a subterranean or under-surface stream of water running down through the defendants' premises and issuing from the surface of this spring? The law is clear with respect to all streams or water courses above the surface, or running over one tract, down and through others, that each owner of the lands through which it passes may use it or so much of it as he may require, but he must not divert it from its natural course so as so deprive his neighbor below of his interest in it. If he does, he is liable for the injury. Where the stream is under ground, instead of above it, the same rule will hold, if it be a well defined subterranean or under-surface stream or water course of which a party complains of being deprived. If a valuable spring is supplied by such a stream, and is ruined by diverting it, the injury is just as great as if the stream had run upon the surface. The only difference is in ascertaining the fact whether, in the former case, it is a clearly, well defined stream which contributes the supply or not; whereas, in the case of a surface stream the matter is susceptible of ocular proof. It is often impossible to say whether a spring is furnished by percolation or by a running stream, a current under ground, and therefore the law, according to the authorities, holds that when the owner of a

spring complains of being injured by his neighbor above him, in consequence of sinking a well or shaft or pit on his premises, thereby depriving the spring of its water, he can have no redress unless he can show that his neighbor has thereby interrupted or diverted a well defined water course, which had before passed through those premises to the spring in question. Without showing this, it will be considered that the supply had been furnished by the general contribution of the soil, and a suit could not be maintained for the alleged injury. So that the law protects the owner in the full enjoyment of his land in such manner as he thinks proper, against all complaints of those who complain of having their springs of water destroyed by reason of his mining or other operations, except when the latter can prove that a stream of water beneath the surface which issued in the spring had been cut off by the former and turned out of its course, proving that the claim to compensation is established.

"You will see from this statement of the law that the question in this case is, whether the spring of Henry Bruckhart was supplied by a running stream under ground, a well defined water course, or by percolation, by the water filtering or oozing through the soil and forming the spring at that point, and this fact you are to ascertain from all the evidence you have heard. If you believe the supply was by a subterranean stream passing through the defendants' land, and that by the pit which they excavated, as the evidence shows, this stream was interrupted, and by their pumping out of the water and changing of its course the plaintiff's spring was made dry, then he is entitled to redress, and your verdict should be in his favor; but if you do not believe that there is a well defined subterranean water course passing through the defendants' land, and issuing in this spring, which they have interrupted by their pumping operations, you will find for the defendants."

The points propounded as above were answered as follows:

"1. I answer this point in the affirmative, and say that this is true, unless it is proved that there is a well defined water course which supplies the spring, and that the party carrying on the mining operations has interrupted or diverted that water course, and thus occasioned the injury to the spring.

"2. The law is so, where it can not be ascertained and shown that the supply is by a well defined water course; though under ground, the entire diversion thereof to the destruction of the spring would entitle the owner of the spring to redress.

"3. The first part of this proposition is correct; but the conclusion can only be sustained, provided the plaintiff has failed to show that the subterranean water supplying his spring flowed in a well defined channel or stream from and through the defendants' premises to the spring, and issued there.

"4. This is conceded as to the conduct of the defendants; as to the rest of the proposition, the objection is, that it requires of the court to pronouce what it is the province of the jury to find. It is for you to say whether the whole evidence proves the existence of a well defined water course in the land of the defendants, which had furnished the water to the spring in question; and the interruption of such water course by the defendants, so as to dry up the plaintiff's spring or not. According to your finding upon that issue, your verdict will be for the plaintiff or for the defendants.

"If you find for the plaintiff, it will be necessary for you to say what damages he has sustained. The proper measure of damages is the inconvenience to which he has been subjected by being deprived of the use of his spring. This you will estimate by the testimony and your own judgment of the injury, according to the facts in evidence."

Under these instructions there was a verdict and judgment in favor of the plaintiff. Whereupon the defendants sued out this writ, averring that the court below erred in not affirming unqualifiedly the four points presented by them on the trial.

H. M. NORTH, for plaintiffs in error, cited and relied on *Haverstick* v. *Sipe*, 9 Casey, 368; 16 Leg. Int. 301; *Panton* v. *Holland*, 17 Johns. 92; 12 Mass. Rep. 220; 8 Johns. 421; *Acton* v. *Blundell*, 12 Meeson & Welsby, 324; *Wheatley* v. *Baugh*, 1 Casey, 528; Am. Railway Cases, 553; *Chatfield* v. *Wilson*, 8 Am. L. Reg. 528; *Ellis* v. *Duncan*, 21 Barb. 230.

WILLIAM B. FORDNEY, for defendant in error, relied on *Wheatley* v. *Baugh*, 1 Casey, 528; *Tyler* v. *Wilkinson*, 4

Mason's U. S. Rep. 397; *Hetrick* v. *Deachler*, 6 Barr, 32; *Miller* v. *Miller*, 9 Id. 74.

The opinion of the court was delivered, July 1, 1863, by STRONG, J.

Confessedly, the absolute dominion of a proprietor over his land to the center of the earth, is restrained by the maxim "*sic utere tuo ut alienum non lædas.*" But what is an injury? The rightful use of one's land may cause damage to another without any legal wrong. An act done, causing damage which the law will redress, must not only be hurtful, but wrongful. There must be *damnum et injuria*, an act not merely hurtful, but an infringement of another's right. The plaintiff in this case can not therefore recover, unless the acts of which he complains were in violation of some rights which he had upon the lands of the defendants. That an inferior proprietor has a right to the uninterrupted flow of the water in a surface water course leading to his land over the land of an adjoining proprietor, is a familiar principle; but he has no such right to an unknown subterranean stream which feeds his spring or flows out upon his land. For any flowage in such a stream, he has, in ordinary cases, no servitude upon the land of his neighbor; at least he has no natural right to enforce such a servitude. After the full discussion which this subject received in *Wheatley* v. *Baugh*, 1 Casey, 528, little remains for us now to add. In that case it was ruled that where a spring depends for its supply upon filtrations or percolations of water through the land of an owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus caused to the proprietors of the spring, unless the injury was occasioned by malice or negligence. To such percolations or filtrations, then, the inferior owner has no right. This was all that was necessary to the decision of the case.

In the opinion delivered by this court, it was said, indeed, that inferior proprietors may have rights in subterranean streams, and those were instanced that in limestone regions often pursue their course in great volume and power, and then, emerging from their caverns, furnish power for machinery, or

supply towns and settlements with water for all the purposes of life. To say that such streams might be obstructed or diverted merely because they run through subterranean channels, would be, said the court, to forget the rights and duties of man in relation to flowing water. Underground currents of such a description are exceptional in their nature, and the same reason exists for holding that a lower proprietor has a right to insist upon their uninterrupted flow, as exists in the case of water courses on the surface. Their existence and their course are generally known. If, therefore, the owner below has any rights in them, they are perceptible, and the owner of the land through which they pass may, in most cases, have the fullest use of his property without disturbing them. What was said upon these exceptional cases had been previously, though more guardedly, said in *Dickinson* v. *The Grand Junction Canal Company*, 9 Eng. Law & Eq. 521, a case decided in the English Court of Exchequer, where a distinction between water running on the surface and sub-surface streams was asserted, but the court said: "If the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground."

Throwing out of view for the present such exceptional cases, there is a well marked distinction between the flowage of water in surface and sub-surface channels.

A proprietor of land may, in the proper use of his land for mining, quarrying, building, draining, or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor. Some of the grounds for the distinction are clearly pointed out in *Acton* v. *Blundell*, 12 M. & W. 324, and others may be mentioned. They are, that in case of an underground supply to a spring or well, or a stream emerging upon land of a lower proprietor, the water does not flow openly in the sight of the owner of the soil under which it passes; that there is therefore no reason for implying consent or agreement be-

tween the proprietors of the adjoining lands beneath which underground currents exist, which is one of the foundations upon which the law as to surface streams is supposed to be built; and that for the same reason no trace of positive law can be inferred. Again, if the lower proprietor has a right to the undisturbed flowage of water through subterranean passages in his neighbor's land, he has the power of preventing that neighbor from using the water in his own soil, for he can not use it and return it to its old passage-way, which he may do in the case of a surface stream. Such a right, if it exists, also exposes the upper proprietor to the hazard of incurring fruitlessly heavy expenditures in efforts to improve or use his land, since he can have no knowledge, until after his outlay has been made, that his contemplated use will interfere with any rights or interests of an adjoining owner. A surface stream can not be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterraneous percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself or that other can have any knowledge. No such right can be supposed to have been taken into consideration when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown sub-surface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downward, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, can not bargain for any right to a secret flow of water in another's land. It would seem, therefore, most unreasonable that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cellars, drains, or by quarrying and mining. A further reason for holding that there is no such right is found in the indefinite nature and great extent of the obligation which would be imposed if the right existed. Instances have occurred where excavations have had the effect of draining land, although at the distance of several miles: Gale & Wheatley on Easements, 178. Even in the case before us, the mining pit of the defendants is more than three hundred feet distant from the plaintiff's spring. These appear to us very sufficient reasons for distinguishing between

surface and subterraneous streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoiner's land. They are as applicable to unknown sub-surface streams as they are to filtrations and percolations through small interstices. Neither can be defined water courses, though they may be definable.

The distinction thus founded in reason is recognized by the law. The civil law adopted it. Thus in Dig. Lib. 39, Tit. 3, Fr. 1, Sec. 12, *De aqua et aquæ pluviæ arcendæ:* "*Denique Marcellus scribit: Cum eo, qui in suo fundo fodiens vicini fontem averterit, nihil posse agi. Nec de dolo actio est; et sane non debet habere si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*" The common law is the same.

The leading case of *Acton* v. *Blundell*, 12 M. & W. 324, already referred to, asserts it distinctly; and the distinction between surface and underground waters, which was there drawn, was recognized in *Dickinson* v. *The Grand Junction Canal Co.*, 9 Eng. Law & Eq. 520, as well as in our own case of *Wheatley* v. *Baugh*. So in *Ellis* v. *Duncan*, 21 Barb. 230, it was ruled that the owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by so doing he interrupts one of the underground sources of a spring on his neighbor's land; and it was said, "the rule that a man has the right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure *his perceptible and clearly defined rights*, is applicable to the interruptions of the sub-surface supplies of a stream by the owner of the soil, and the damage resulting from it is not the subject of legal redress."

The same thing was decided in *Roath* v. *Driscoll*, 20 Conn. 533, 542; and in *Brown* v. *Illins*, 27 Conn. 84, it was more emphatically ruled, and the court adopted the mode of expression used by one of the counsel in *Acton* v. *Blundell*, saying, in regard to subterranean streams and currents, "there is not any *jus alienum* on the part of the owner of the other lands, and therefore the maxim '*sic utere tuo ut alienum non lædas*' does not apply." Nor are there any well considered decisions which are inconsistent with these. *Whetstone* v. *Bowser*, 5

Casey, 59, was a case where the stream diverted was partly on the surface and partly underground. It was a well known stream, and the diversion complained of was on the surface. In *Smith* v. *Adams*, 6 Paige, 435, the stream which supplied the spring was known, and the water was taken from a place just above the point where it had emerged, not for the enjoyment of the land where it had flowed, but for the use of another tract at some distance from it.

We think, therefore, that the learned judge of the Common Pleas misapprehended what had been ruled in *Wheatley* v. *Baugh*. The defined water courses there spoken of, which a man may not divert to the hurt of an inferior proprietor, are not the hidden streams of which the owner of the soil through which they pass can have no knowledge until they have been discovered by excavations made in the exercise of his rights of property.

There are known streams to which, if the lower proprietor has any rights, they are perceptible, and require no sub-surface exploration before their course can be defined.

We are not, however, to be understood as intimating that an owner may maliciously or negligently divert even an unknown subterranean stream to the damage of a lower proprietor. But in the enjoyment of his land he may cut drains, or mine, or quarry, though in so doing he interfere with the flowage of water in hidden, unknown, underground channels.

Applying these principles to the present case, we are constrained to say we see no evidence of malice or negligence on the part of the defendants. Mining on their land, as they did, was no more than the exercise of their legal rights. If, in so doing, they interrupted an underground stream which supplied the plaintiff's spring, it was *damnum absque injuria*, and there was no evidence of the existence of such a known, well defined water course underground in the land of the defendants as will enable the plaintiff to maintain an action against them for diverting it by their mining operations, and thus destroying the spring. The points proposed by the defendants should have been unqualifiedly affirmed.

The judgment is reversed, and a venire de novo awarded.

THE NEW BOSTON COAL AND MINING CO. v. THE POTTSVILLE WATER CO.

(54 Pennsylvania State, 164. Supreme Court, 1867.)

Practice on appeal from preliminary order. A preliminary injunction must stand or fall according to the merits of the case when granted.

[1] **Power to enjoin should be cautiously used.** An injunction is a high exercise of power, and should be very cautiously exercised; but when large and expensive works are sought to be stopped for something incident to their lawful employment, and not on account of direct or willful encroachment, it should be made clearly to appear that it is a case for equitable intervention, that there is no adequate remedy at law, and that otherwise irreparable injury will ensue.

Necessity to justify its exercise. The necessity, to justify the writ, should amount to a case where compensation could not be made.

[2] **Anticipated pollution from mine drainage not to be enjoined.** The drainage from the mines of defendant, and the accumulations of coal dust at their mines, it was alleged, would pollute the water used by complainant to supply certain towns. The works of defendant had been erected at great expense, and it did not clearly appear that any material pollution had actually occurred to the water at the time of the hearing. *Held*, that the injunction should have been refused.

January 24 and 25, 1867. Before WOODWARD, C. J., THOMPSON, STRONG, READ and AGNEW, JJ.

Appeal from the decree of the Court of Common Pleas of Schuykill County. In Equity.

This was a bill in equity filed in February, 1866, by The Pottsville Water Company against The New Boston Coal and Mining Company and George Potts.

The bill alleges the incorporation of the plaintiffs in 1834, and that by a supplement of February 18, 1854, they were authorized to bring into Pottsville fresh and pure water from Mill creek or any of its branches, with power to hold land, etc., etc.; and also to supply the towns of St. Clair, Port Carbon, Palo Alto and Mount Carbon, for domestic and manufacturing purposes and for stationary and locomotive engines,

[1] Danger of flooding to enjoined mine: *Clavering* v. *Clavering*, 2 P. Wms. 388; *Post* TENANT FOR LIFE.

[2] *Nevada Co.* v. *Kidd*, 37 Cal. 283.

and that it was made penal "wilfully to corrupt or permit anything to run or fall into any stream from which the said company shall take water to be introduced into the borough of Pottsville, which shall tend to corrupt the same, or to render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supply of stationary or locomotive engines;" that the company had expended $130,000 in constructing their works, laying pipes, etc., and had been supplying water for ten years; that up to 1854 they supplied water from springs near Pottsville on Sharp mountain, and the water becoming polluted by washings, dirt, etc., from coal mines there, they entered upon land on Broad mountain and erected there a dam, etc., at considerable cost, to secure the waters of Mill creek, and have, from 1859, maintained a costly line of water pipes from this dam to Pottsville, a distance of five miles; that the defendants had for six months been engaged in opening coal mines by a large slope on Broad mountain, near the head waters of Mill creek; that in sinking the slope, large underground currents, impregnated with sulphur, etc., and making a compound which is unpalatable, unwholesome and corrupt, and which runs into Mill creek above the plaintiffs' dam, "and thereby not only tends to corrupt, but does corrupt the waters of said Mill creek, which flow into said dam and thence into the line of water pipes of the complainant. It destroys the purity of said water; has a tendency to corrode, and eat into and perforate the iron water pipes and the boilers of the locomotives and stationary engines, and to render the water unpalatable, unwholesome and unfit for domestic or manufacturing purposes;" that the defendants threaten to open a large colliery, which will largely increase the discharge of the impure water and greatly increase and aggravate the injury to the waters of Mill creek; that they have deposited coal, coal dirt and other debris at the top of the slope, which, in the ordinary working of the colliery, must be greatly increased, and that the rain and other washings will carry these impurities into Mill creek, clogging the pipes of the plaintiffs and corrupting the water; that notice of these evils was given to the defendants as early as June 23, 1865.

The complainants asked for equitable relief:

1. That it may be decreed that the defendants have no right to cause and permit the water, taken from said slope, to flow into Mill creek above the dam of the complainants.

2. That they have no right to make deposits of coal, coal dirt, slate and other debris, so that the falling rains or other washings shall cause the same to be carried into Mill creek above the dam of the complainants.

3. That an injunction, special till hearing and perpetual thereafter, may be issued to restrain the defendants from causing or permitting the water taken from their slope to flow into Mill creek above the dam of the complainants, and also to restrain the defendants from depositing coal, coal dirt, slate and other debris, so that the falling rains or other washings shall cause the same to be carried into Mill creek above the dam of the complainants.

Such further and other relief as to the court may seem meet.

The defendants answered that they were owners of 1,200 acres of land in the New Boston Anthracite basin, valuable only for the coal they contain, worth $1,000,000, known to the plaintiffs as such before putting in their water pipe; that in 1852 the then owners erected an engine, sunk a shaft and pumped water, which was before the plaintiffs made any movement to appropriate the water of Mill creek; that the improvements of the then owners cost above $100,000; that it is necessary to drain the mines through the whole of this coal field, otherwise the coal can not be mined and taken away; that the water thus drained flows into the natural channels tributary to the Schuylkill, Mill creek being one, and this is the uniform and only method of discharging the water; that its natural passage into Mill creek is five miles above the commencement of the plaintiffs' pipe, and their dam could not have cost above $5; that the defendants have expended above $250,000, and if they should be stopped, this sum with the land must be rendered of no value and the works and mines lost forever; that they claim no right to put any dirt, etc., in such position as that they will be taken into Mill creek; that the mine water is pure and free from acid and nauseous matter, and does not affect the wholesome qualities of Mill creek; that the complainants take the main supply of

water from Wolf creek, a tributary on which there are no coal mines, and by little effort can preserve the water pure and wholesome; the defendants further say that they do not intend to do anything to affect the plaintiffs' interest, but to work their collieries in the most prudent manner; but they own the land and have a "legal and natural right" to mine, etc., and are not responsible for the usual and natural flow of the water by the usual and only mode of conducting their collieries; that the plaintiffs have only the right of the water subject to the prior rights of the defendants to use Mill creek for a drain from their lands; the defendants also denied that they were notified that the evils complained of by the plaintiffs would result from their mining.

Affidavits were taken: those on the part of the plaintiffs testifying that water from such a colliery was not so injurious when first opened as it would become afterward, and the longer it is worked the more injurious it becomes; that the water is unfit for drinking or for boilers; and water percolating through debris from such mines would be equally injurious, and that the water from defendants' mines would not be relieved from the deleterious qualities in the distance from the mines to the plaintiff's water pipes; that the water had not affected boilers in which it was used, but that since September, 1865, the water left a reddish stain which it had not done before. For the defendants, it was testified that fish in full life were found in Mill creek above the pool. Booth & Garrett made an analysis of the water and found that above the defendants' slope there were 1.66 grains of solid matter to the gallon, principally silicious; at the slope 6.34 grains per gallon, consisting chiefly of sulphates of iron, lime and magnesia. The same chemists furnished a sworn certificate, dated September 25, 1866, from which the following are extracts:

	Grains of solid matter per gallon.
Average of Thames water, London	20
Schuylkill river, at Schuylkill Haven	18
Schuylkill river, at Philadelphia	7
Delaware river, at Philadelphia	3½
Company's water, at dam, Mill creek	2⅛

"The table shows clearly that in quantity of solid matter

per gallon, the Pottsville Company's water, where it enters their pipes from the Mill creek dam, is purer than any of the above waters, at Philadelphia or London, which are employed by millions of people with safety.

* * * * * * *

"It therefore follows from all of the above facts,

"1. That the water of Mill creek, where it enters the Pottsville Water Company's pipe, is one of the purest waters used for drinking purposes and for steam boilers, by reason of its extremely small content of solid matter per gallon, and of the composition of that matter.

"2. That the colliery works and waters of the New Boston Coal Mining Company do not in the slightest degree injure, or even appear in any way to affect, the waters of Mill creek; because the water is purer where it is tapped by the Pottsville Water Company than it is above the colliery.

"3. That the evidence deducible from the analysis, is, that the waters of Mill creek are improved rather than deteriorated by the colliery, because they become better and purer from the point where the colliery waters enter the creek."

The court (RYON, P. J.), on the 10th day of September, 1866, "decreed that a writ of special injunction shall be issued, to restrain the defendants from causing or permitting the water taken from their slope to flow into Mill creek at any point above the dam of the complainants on the Broad mountain, and also to restrain the defendants from depositing coal, coal dirt, slate and other debris, so that the falling rains or other washings thereof shall cause the same to be carried into Mill creek, at any point above the said dam of complainants.

"Said injunction to remain in full force until hearing, or until said defendants shall well and sufficiently lay a line of water pipes for the use of said company, to be connected with the pipes of said company at said dam, and extending from thence upward so as to receive and collect therein all the water that may flow into Mill creek and its tributaries above said dam, and above the point opposite the slope of the defendants, or so much thereof as said company may desire to collect in said pipes, the work of said extension and laying of the water pipes aforesaid to be done under the supervision of the said complainants."

The defendants appealed. The errors assigned were to the decree of the court.

E. K. PRICE, for appellants.—The power of review given to the Supreme Court by Act of June 16, 1836, § 1, Purd. 928, pl. 19, Pamph. L. 785, is a large power, and to be liberally construed: *Chase* v. *Miller*, 5 Wright, 411; *Thomas* v. *Brady*, 10 Barr. 169; *Thomas* v. *The Northern Liberties*, 1 Harris, 117. The expenditures of defendants have been $250,000, and their land is worth $1,000,000. The capital of the plaintiffs is $130,000. Mill creek is the natural drainage of all the defendants' lands, as well as others higher up the stream.

If this injunction can be maintained, the plaintiffs can take the defendants' property without compensation; they take away the profits of the land, which are equivalent to the freehold title: *Carlisle* v. *Cannon*, 3 Rawle, 489; *Miller* v. *Casselberry*, 11 Wright, 376; *Sch. Nav. Co.* v. *Moore*, 2 Id. 477, 491. The owner of the land has the incidental right to the water course, the water and its channel for drainage. Where the country is valuable only for minerals, it becomes a *necessity* that the channels below the openings of the mines become the channels to carry down mine waters. Any appropriation injurious to another may be resisted: *Bealey* v. *Shaw*, 6 East, 208; *Sanders* v. *Norman*, 1 B. & Ad. 258. The right of the water course and its drainage are a part of the estate itself: *Wood* v. *Waud*, 3 Exch. 748; *Taylor* v. *Wilkinson*, 4 Mason's Rep.; Bainbridge on Mines, 101, 102. The greater convenience is to be subserved: *Flanagan* v. *City of Philadelphia*, 6 Wright, 219; *Monongahela Bridge Co.* v. *Kirk*, 10 Id. 112, 130; *Gardner* v. *Village of Newburyh*, 2 Johns. Ch. R. 162; *Bonaparte* v. *The Camden and Amboy Railroad Co.*, 1 Bald. 206; Registrum Brevium, 252; Fitzherbert N. B. 225, 510, 515; Callis on Sewers, 93–94; *Attorney General* v. *Brittain*, 6 B. & C. 519. Private corporations have only the powers expressly granted: *Penna. Railroad Co.* v. *Canal Commissioners*, 9 Harris, 22. The water company was not a riparian owner, and they knew that Mill creek drained the water from the defendants' mines when they constructed the works: *Rex* v. *Neville*, Peake's Cases, 91. If the water company's char-

ter had authorized them to infringe the defendants' rights, compensation would have been provided: *Commonwealth* v. *Snyder*, 2 Watts, 418; *Sch. Nav. Co.* v. *Loose*, 7 Harris, 15; 3 Rep. 13, 85; 2 Int. 56, 301, 280; Magna Charta, Art. 9, § 11, L. p. 18, Hob. 98; *The Queen* v. *Eastern Counties Railway Co.*, 2 Q. B. 347; *Pickford* v. *Grand Junction Railway Co.*, 10 M. & W. 415; *Bell* v. *Hull and Selby Railway Co.*, 6 Id. 699; *Sun. and Erie Railroad* v. *Hummell*, 3 Casey, 104; *Lehigh Valley Railroad* v. *Trone*, 4 Id. 207; *Lehigh Bridge Co.* v. *Lehigh Coal and Nav. Co.*, 4 Rawle, 23; *Sch. Nav. Co.* v. *Loose*, 7 Harris, 16; *Reg.* v. *The Recorder of Manchester*, 5 Eng. Law & Eq. 355; *Barclay Railroad* v. *Ingham*, 12 Casey, 202; *Sun. and Erie Railroad* v. *Hummell*, 3 Id. 99; *Watson* v. *Pitts. and Conn. Railroad*, 4 Wright, 480.

It is not enough to *apprehend* an injurious flow of mine water: *Elmhirst* v. *Spencer*, 2 Mac. & G. 45; *Wood* v. *Waud*, 3 Exch. 748; Woolrych on Water, 178.

There was no nuisance before the act of 1854; if it is a nuisance since, the water company have made it so. This is a question of fact for a jury: *Attorney General* v. *Cleaver*, 18 Ves. 218; *Birmingham Canal Co.* v. *Lloyd*, 18 Id. 515; *Robinson* v. *Byron*, 2 Cox, 4; *Attorney General* v. *Utica Ins. Co.*, 2 Johns. Ch. 383; *Beaufort* v. *Morris*, 2 Phillips, 683; 6 Hare, 340; *Gilder* v. *Merwin*, 6 Wh. 541; *Commonwealth* v. *Bank of Penna.*, 3 W. & S. 184; *Hagner* v. *Heyberger*, 7 Id. 104; *Mayor* v. *Commissioners, etc.*, 7 Barr, 348, 366; *Fishmongers' Co.* v. *East India Co.*, 1 Dick. 164; 2 Eden on Inj. 269, 274; Drewry on Inj. 248; 3 Dan. Ch. Pr. 321; 2 Story's Eq. § 925; *Ripon* v. *Hobart*, 3 My. & K. 169. It is only when a thing has become a nuisance that it can be restrained by injunction: *Heilman* v. *Union Canal*, 1 Wright, 103; Adams's Eq. 485; Fonbl. Eq. 51; *White* v. *Booth*, 7 Vt. 131; *Shields* v. *Arndt*, 3 Green's Ch. 234; *Caldwell* v. *Knott*, 10 Yerger, 209; *Hart* v. *Mayor of Albany*, 3 Paige, 213; *Reid* v. *Gifford*, 6 Johns. Ch. 19; *Biddle* v. *Ash*, 2 Ash. 211; *Gardner* v. *Newburgh*, 2 Johns. Ch. 164; *Van Bergen* v. *Van Bergen*, 3 Id. 286; *Rhea* v. *Forsyth*, 1 Wright, 506. A chancellor will not stay the working of a colliery except where there is a breach of an express covenant or an uncontroverted

mischief: Ambler, 209; Bainbridge on Mines, 310; *Sheppard* v. *Oxenford*, 25 Law Times R. 90; Brightly's Eq. 176.

F. B. GOWEN and F. W. HUGHES, for appellees.--The water company had a right to the water of Mill creek which flowed into their dam. Their right was more than an inferior riparian owner: *Kauffman* v. *Gieserner*, 3 Casey, 413; *Martin* v. *Riddle*, Id. 417. When their right was invaded, there is no question as to *amount* of damages, but only as to the *right: Commonwealth* v. *Pitts. and Conn. Railroad*, 12 Harris, 139. The mining company has a right to remove the mine water, but not so as to corrupt the stream on an inferior owner: *Howell* v. *McCoy*, 3 Rawle, 256; *Commonwealth* v. *Lyons*, 3 Law Jour. 167. Courts of equity will restrain private as well as public nuisances: 2 Story's Eq. §§ 926, 927, 982. The corruption of the water is also a public nuisance and the water company has the duty in this respect of protecting the public rights: *Harrisburg* v. *Crangle*, 3 W. & S. 460; *Devoe* v. *Penrose Ferry Bridge*, 3 Am. Law Reg. 83; *McCallum* v. *Germantown Water Co.*, 54 Pa. St. 40; *Wheatley* v. *Chrisman*, 12 Harris, 298; Rogers on Mines, 494; *Mayor* v. *Chadwick*, 11 Ad. & E. 571; *Wood* v. *Sutcliffe*, 8 Eng. Law & Eq. 217; 2 Johns. Ch. 162; *Goldsmith* v. *Tunbridge Wells Commissioners*, 35 L. J. R. 82, Eq. Cases; *Wood* v. *Waud*, 3 Exch. 748; *Holsman* v. *Boiling Spring Bleaching Co.*, 1 McCarter Ch. R. 335; *Spokes* v. *Banbury Board of Health*, L. J. R. Eq. Ser. 41, Jan., 1866.

The mining company have not a right by artificial means to create a drainage: *Martin* v. *Riddle*, 2 Casey, 415. The water company has a right from the Commonwealth to take the whole volume of water.

MEREDITH, for appellants, in reply.—The act allowing appeals on preliminary injunctions conforms them to the English practice. Court will never stop an open mine unless compelled: Ambler, 209; *Hilton* v. *Granville*, Craig and Phillips, 284.

The complainants are in this dilemma. They have brought their bill too late, or asked for a preliminary injunction too early.

There are two grounds for injunction: 1. Threat of doing

an unlawful act. The complainants were bound to file their bill as soon as they knew the mine was to be opened; but they have lain by and seen the company build works and erect extensive machinery, and therefore they are too late with their bill.

2. If the working be not *a present nuisance*, a moderate working must be allowed until the nuisance is appreciable: *Earl of Ripon* v. *Hobart*, 3 Mylne & K. 169.

There are two peculiarities in this case. It is real estate whose only possible use is mining coal. Coal can not be mined without pumping mine water, and the drainage *must* go into the creek.

The complainants are not riparian owners. A stranger has not the same right to a stream as a riparian owner. A stranger can not get to it without trespass. The company are to collect the water and sell it; they have fouled all the other water: Rogers on Mines, 494, 495; *Weeks* v. *Howard*, 10 Weekly Rep. 557. One used water for plants; a man above fouled the water, and the other brought his bill; it was held that he could not maintain it because he was not a riparian owner.

The opinion of the court was delivered February 18, 1867, by THOMPSON, J.

This case is here on appeal by the defendants, from an order or decree of the court of common pleas, granting a preliminary injunction against them to restrain them from pumping the water from their mines and permitting it to flow into Mill creek, above the dam of the complainants, whence they mainly derive a supply of water for the purposes of their corporation, and also to restrain them from depositing coal, coal dirt, slate or other *debris* of their mine in such a position as that it may be subject to be carried into the said stream by rains above this dam.

The only question before us is, whether the injunction was properly or improvidently granted at the time it was granted. It must stand or fall according to the merits which it possessed at the time it was granted: 17 Sim. 15; Hilliard, S.

The case is not at all before us on the merits of the contro-

versy, but only whether such a state of fact was shown to the court as justified it, according to chancery practice, to stop the works of the defendants, and order them to stand still until the subject of the dispute should be finally adjudicated. In all cases this is a high exercise of power, and should be very cautiously exercised; but in a case where large and expensive works are sought to be stopped, not on account of direct or willful encroachments, but for something incident to a lawful employment, it should be made clearly to appear that it is a case for equitable intervention; that there is no adequate remedy at law, and that if not enjoined, irreparable injury or mischief will ensue to the party complainant. It is an appeal, say the books, to the extraordinary power of the court, and the plaintiff is always bound to make out a case showing a clear necessity for it—a necessity in the light of inability to be compensated for the wrong which would ensue if not exercised. The affidavits read by the plaintiffs on the motion did not show, we think, such a condition of things as left the chancellor scarcely an option, in view of the clear justice of the plaintiffs' case, but to restrain the defendants. They were very far short of this. The complaint was that the defendants were polluting or deleteriously affecting the water in Mill creek by pumping water from their mines and permitting it to run into it. The ground for the complaint was that the plaintiffs had a right, by virtue of their act of incorporation, to the water of the stream for the supply of water to Pottsville and other places mentioned, in its native purity, and free from contamination by mine water. The defendants claimed that their property embraced the stream, and the stream might be used by them on the premises to carry off their surplus water, and especially as no other possible outlet existed; and furthermore, that they had expended very large sums of money, about $250,000, in opening their mine, erecting machinery, making various improvements, etc., etc., besides the cost of the property; that the expense of the works had been incurred without notice or complaint from the plaintiffs. The plaintiffs, however, allege that they did at one time give notice of objection to the manner of opening the mine. Be this as it may, it was not very material in the stage of the proceedings when the injunction was granted;

for whether it should be granted or not would depend upon whether there was a clear right to intervene on the part of the plaintiffs; and secondly, whether it was necessary to grant the injunction in order to prevent irreparable injury or mischief.

We have carefully examined the affidavits read by plaintiffs on the hearing for the preliminary injunction, and while it is probable water near the mines was more or less affected, according to the chemical analysis employed on the water from the mines, it was but slightly so, if at all, at the plaintiff's dam. Above the mine the water in the stream showed 1.66 grains to the gallon, silicious and organic matter. This we learn is very pure water. Below and near the new slope it showed 6.39 grains to the gallon of sulphate of iron, lime and carbonaceous matter. At the dam, five miles below, the plaintiffs did not show the state and condition of the water, yet there was proof on that point. Booth & Garrett, the chemists employed, certified to the purity of the water analyzed by them, and taken, as they say, out of Wolf creek, and found it very pure, exhibiting 1.40 grains of organic matter to the gallon. But the witness who procured the water swears it was taken from the plaintiffs' dam on Mill creek. If true, it would show that the water at the point material to the plaintiffs was not affected by the mines. Another item of proof on the point was the existence of fish in the dam, a thing not to be seen in the Schuylkill, it is said, in the neighborhood of mines.

Upon this showing, a case for preliminary injunction for injury being done had not accrued. Nor do we think the anticipated injury to the water was so imminent as to require action before final hearing, and the stoppage of the defendants' works, which would result in great damage to one or other of the parties. The water may become materially deleteriously affected by the mine, and it may become the duty of the courts to interfere in some way that will be just and equitable to all parties, but about that we forbear to express any opinion. We only decide at this time that the measure adopted was not required or provident under the circumstances. The defendants' answer is in, and was so when the injunction was granted, and denies the equity of the plaintiffs' bill, as also the special grounds for interference. Although

this is a matter to be considered in granting an injunction, yet we decide on the plaintiffs' case against the injunction, and we must reverse the order for it.

And now, to wit, February 14, 1867, the order or decree for special injunction in this case is reversed and set aside, together with the writ of injunction, at the costs of the appellee.

READ, J., dissented.

THE LOCUST MOUNTAIN COAL AND IRON CO. v. GORRELL ET AL.

(9 Phila. 247. - Supreme Court of Pennsylvania, at *Nisi Prius*, 1872.)

Upper mine must drain to surface, if practicable. The owner of the upper colliery can not wantonly allow his water to flow into the lower mine if he can by the use of reasonable diligence control its flow and carry it to surface. The maxim *sic uteré tuo ut alienum non lædas* controls in such cases as it does in cases where the surface and the minerals they been severed.

In Equity. Motion to dissolve injunction. Opinion delivered March 27, 1872.

R.C. MCMURTRIE, for complainant.

GEORGE M. DALLAS, for defendants.

AGNEW, J.

That underground rights can not be exercised with exact regard to the rules which govern surface rights, must be admitted, for the consequences are not always visible or capable of being prevented. In mining beneath the surface some things must happen, as it were accidentally, which are not the results of negligence or willfulness. Hence, I am not disposed to deny the general rule as stated, by CRESSWELL, J., in *Smith* v. *Kenrick*, 7 C. B. 515, (62 Eng. C. L.) that it would seem to be the natural right of each of the owners of his adjoining coal mines—neither being sub-

ject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine so long as that does not arise from the negligent or malicious conduct of the party. But this is not to be accepted in too broad and unlimited a sense, nor be permitted to overturn the maxim *sic utere tuo ut alienum non lædas* in those matters where a proper attention to the rules of careful and ordinarily skillful mining would preserve the adjoining and even subjacent mine from damage. The case itself does not support the unlimited extent to which the argument for the defense seemed to carry the rule. During the argument in *Smith* v. *Kenrick*, MAULE, J., remarked: "Nobody suggests that an action will not lie for wrongfully turning water into another man's mine." In the opinion of CRESSWELL, J., also, it is admitted that a man may cause water to flow from his own premises into his neighbor's, so as to make himself liable to an action. Our cases of *McKnight* v. *Ratcliff*, 8 Wright, 156 and *Douty* v. *Bird*, 10 P. F. Smith, 48, seem to look in the same direction. The rule, therefore, is rather to be restricted, in relation to descending water, to that which finds its way into the subjacent mine, unintentionally as it were, on part of the superjacent miner, where in the course of careful and proper mining in taking out his own coal, the water sinks below without negligence or malice on his part, even though in an increased quantity.

In Bainbridge on Mines, Chap. 10, Sec. 3, Dallas' ed., p. 455, it is said the law is founded on the natural assumption that water is the common enemy, which, whether open or concealed, each owner must combat for himself; and upon another but consistent principle that each owner has the full right to extract the greatest possible benefit from his property, and that if in so doing he injure his neighbor, he will not be liable to an action if his acts spring from no malice or mischief, and are simply consistent with a reasonable exercise of his own rights. This is substantially the same rule stated by CRESSWELL, J., in *Smith* v. *Kenrick*, and it is chiefly taken by Mr. Bainbridge from that case, in which the two controlling facts were that the plaintiff had left no barrier in his own

subjacent mine to keep out the water from above, and the defendant had only worked out the coal upon his own land above, which before had served as a barrier to the water descending from a higher grade. Neither negligence in mining nor willfulness was imputed to the defendant. I can not perceive, therefore, that the principles to be deduced from the rules stated carry the right of the owner of the superjacent mine beyond the admission of the consequences of his careful and skillful mining as lawful; and if a loss follow from water —the common enemy—it becomes merely *damnum absque injuria.* Hence, when water, following the law of gravitation, after the removal of coal in a careful and proper manner, finds its way by percolation or through fissures unforeseen and unknown, into the lower mine, its owner can not complain of it as an injury done by the owner of the upper mine. These principles find support in the opinions in *Kauffman* v. *Griesemer*, 2 Casey, 407, and *Martin* v. *Riddle*, Ibid. 415. I incline to think, also, that openings made before by a trespasser from the lower into the upper mine, and unexpectedly struck by the upper owner in mining, do not differ from natural fissures in the effect produced upon the lower mine.

Though the owner of the lower mine may not be held responsible for the unlawful act of a tenant trespassing by making an opening from his into the upper mine, the owner of the upper mine is clearly not responsible to the owner of the lower mine for the trespass committed by the tenant of the latter. But while such may be the consequences of careful and proper mining above, when the owner of the upper has made no openings into the lower mine, I think these consequences can not be carried beyond this limit, to authorize the upper owner to mine in disregard of the rights of the lower owner. Here the maxim *sic utere tuo ut alienum non lædas* should have its full play. This maxim was applied by the Supreme Court in the case of *Jones* v. *Wagner*, 16 P. F. Smith, 430, where a division of land was affected by a partition of the coal from the super-incumbent surface land. It was held that the owner of the coal vein must leave pillars to support the land above, and was liable in damages for an injury to a house caused by the sinking of the land into the chasm beneath. The case is not exactly parallel with that of

adjoining owners who owe no special duty to each other, but still there had been a complete severance by partition of the coal from the land above, and the maxim was allowed its full force in settling the question of duty. When, therefore, as in the present case, the miner in the upper mine, in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of his gangway into the opening thus struck, if by reasonable means he can carry the water across the drain into the gutter or drain leading into his own sump. It is conceded this can be easily done by means of a wooden trunk stretched across the opening. Good mining requires the owner of every mine to ditch his gangway and lead off the water gathering in it to his sump, and thus to clear his mine of its enemy.

There is no good reason, therefore, why the owner of the upper mine should suffer the flow of his gangway to run down upon the lower mine, when by reasonable diligence he can prevent it. But it is argued that such means would be insufficient to carry through all the water in the case of a sudden overflow, from heavy rains or melting snow, upon the surface; and much would necessarily pass into the lower mine. But clearly this is no excuse for a total neglect to make provision for carrying off the ordinary flow of water along the gangway, and for emptying it into the lower mine. Whatever might be the legal consequence of a sudden and extraordinary overflow in the mine, upon which no opinion is now called for, it can not excuse the neglect to provide for carrying through the ordinary flow along the gangway. To adopt the principle that an upper owner is liable for no act done within his own mine, and no neglect, because it fell within his own proprietary right, would lead to results disastrous to mining in general, and could not be tolerated. There are duties men owe to each other below the surface of the earth, as well as upon it. My conclusion upon the whole case, after hearing the new affidavits, is that the injunction should be continued, but in a modified form.

It is therefore ordered that the defendant be restrained from skipping the pillars in the breasts heretofore specified, until

the report of the arbitrators appointed by the parties under the lease of the Hazel Dell mine shall be made, and after said report he shall be restrained from skipping the said pillars contrary to the said report, and no more; and that the said report shall be procured to be made within twenty days from this date. That the defendants shall be restrained and enjoined from permitting the ordinary current of water flowing from his mine along his gangways toward his sump from escaping and falling into the openings leading therefrom into the mine of the plaintiffs; and that this injunction shall stand until final hearing and decree, or until superseded or otherwise altered by the court.

PHILADELPHIA & READING COAL & IRON COMPANY v. TAYLOR ET AL.

(5 Legal Gazette, 392. Common Pleas of Schuylkill County, Pa., 1873.)

[1] **Upper and lower mines on the dip.** Where there are two mining operations—one owner working on the upper level and one on the lower level of the same vein—the owner of the upper level, operating in the most approved method and with care, is not required to control the natural flow of the water downward, and may work his coal out down to his line; and the maxim of the common law, *sic utere tuo ut alienum non lædas*, applies.

Barriers. And the owner of the subjacent level owns a servitude, and must leave a pillar of coal to support the gangway and keep out the water from the level above.

Adjoining owners. Adjoining owners on the same level of the same vein, owe no special duty to each other.

Purchased easement can not be drowned out. When, however, the owner of the superjacent land has created a servitude upon his land in favor of the subjacent owner, such as a right to drive an air-way through his works and to connect with the surface, such owner, after he has worked all his coal out and is about to abandon his workings, must give reasonable notice of this to the owner of the dominant tenement, and on failure so to do, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement—the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied.

Reasonable notice is relative, and depends upon the work to be performed.

[1] *Fletcher* v. *Smith*, 5 M. R. 78, and note.

[1] **Entry, to enforce easement.** A party having an easement on the land of another, may go upon the land for the purpose of the enjoyment of such easement to its fullest extent, either to construct or repair, or secure it from danger—doing as little damage as possible, and responsible for that damage—for the grant of a privilege carries with it everything necessary to its enjoyment.

Injunction.

Opinion by WALKER, J., delivered October 27, 1873.

This bill in equity was presented at chambers on 1st October, 1873, and a special injunction was asked for, preliminary until hearing, and thereafter to restrain the defendants from permitting their old workings on Little Mine Run colliery to fill with water, until the plaintiffs can procure machinery of sufficient capacity to pump the same out of their own slope at the Bast colliery.

The preliminary injunction was granted and the hearing fixed on October 7, 1873, at which time it was ably argued by counsel.

The injunction is asked to prevent the defendants from allowing their old workings to fill up with water.

The reasons assigned for this writ are:

1. That the plaintiffs' operation at the Bast colliery will be irreparably injured, and the lives of their men endangered if the defendants be allowed to flood their old workings with water, and

2. That they will be deprived of the right and privilege of completing their air-way, and their purchase of that right will be rendered valueless and useless.

In the first place I am asked, on account of the great and irreparable injury to the plaintiffs' operation and danger to their workmen, to restrain the defendants from allowing their mines to fill with water, or to permit the plaintiffs to come upon their land and pump out the water.

Before this can be done, the plaintiffs must establish some right upon which to found equitable interposition. If they have no such right they are entitled to no remedy, though they may suffer irreparable injury: *Chadwick* v. *Trower*, 6 Bing. (N. C.)1. 37 Eng. Com. Law, 255. It is not alleged

[1] *Crisman* v. *Heiderer*, 5 Colo. 589.

that the defendants in the working of their operations have been guilty of any trespass, or that they have heretofore done any matter or thing inconsistent with the most approved method of mining.

Have the plaintiffs then a legal right to require the defendants to keep the water out of their levels, in order that they may enjoy and use their own works in the level below? In determining this it will be necessary to consider the relative rights of owners of upper and lower levels, and of adjoining lands to each other under the present system of mining coal.

It often happens that there are two estates in the same land —the surface right and the underground right. One owns the surface and the other the minerals below the surface. These estates are well defined and are consistent with each other: *Caldwell* v. *Fulton*, 7 Casey, 483.

The owner of the surface, if not restricted by his deed, has a perfect right to erect his buildings and make his improvements on any portion of his land, even upon a crop of a coal vein belonging to another person and which ultimately will be worked.

The owner of the coal has a servient right, and is bound in working it to leave a pillar to support the surface. Baron PARKE, in *Harris* v. *Ryding*, 5 Meeson & Welsby, Exch. 60, remarks: "I do not mean to say that all the coal does not belong to the defendants, but they can not get it out without leaving proper supports." See also *The Earl of Glasgow* v. *The Alum Co.*, 8 Eng. Law and Eq. 13.

The upper and under-ground estate being several they are governed by the same maxim which limits the use of property otherwise situated, "*Sic utere tuo ut alienum non lædas.*" *Jones* v. *Wagner*, 16 P. F. S. 429, per THOMPSON, C. J.

The same doctrine obtains in the working of upper and lower levels on the same vein.

There are certain rights well known and recognized, as to the flow of water upon the surface of the ground. "*Aqua currit et debit currere.*" is the common law maxim of water courses. The distinction between subterranean and surface rights, is ably discussed in *Acton* v. *Blundell*, 12 Meeson & Welsby, 324, by TENDALL, C. J. and seems to be that as to the surface flows, parties acquire rights to them, because every-

body who has an interest in the matter acquiesces in them; but as to underground percolations no rights are gained, because nobody knows anything about them. There is a marked and substantial difference between them, and it was there held that the owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a land owner who, carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first mentioned owner, and lays his well dry.

Under the English decisions the owner of the land, if he be the first who mines, may work his vein up to this line without leaving a pillar stand, and the owner of the adjoining property is required to leave the pillar, to keep out the water: *Clegg* v. *Dearden*, 64 Eng. Com. Law Rep. 575. "Adjoining owners owe no special duty to each other:" *The Locust Mountain Coal and Iron Company* v. *Gorrell*, Leg. Int. 29th March, 1872.

Under the rule here laid down, the plaintiffs, working on a lower level, were bound to leave a sufficient pillar of coal standing, to prevent the water in the upper level from breaking through. And if they, or those under whom they claim, have not done so, it is their own neglect, and becomes *damnum absque injuria*, for they must have known that the coal in the upper level would ultimately be worked out and be abandoned, and the water following its natural flow downward, would collect in the old workings, and might break through upon them.

The owner of a higher level may mine all his coal out down to his line, and he is not responsible for water that flows in the lower level by gravitation: *Baird* v. *Williamson*, 109 Eng. Com. Law Rep., p. 375. See *Smith* v. *Kenrick*, 7 M. G. & S. 515 (62 Eng. Com. Law Rep.) as the leading case on this subject in England. See also *The Duke of Beaufort* v. *Morris*, 6 Hare, 340; also as bearing on this subject, see *Kauffman* v. *Griesemer*, 2 Casey, 407; *Martin* v. *Riddle*, 2 Casey, 415; *Bentz* v. *Armstrong*, 8 W. & S. 40; *Merritt* v. *Parker*, 1 Coxe, 460; *Williams* v. *Gale*, 3 Harr. & J. 231. If this was the only reason, an injunction certainly could not be granted.

The second point made by the plaintiffs is, that having purchased from two of the defendants (acquiesced in by the other partner) an easement or right to make an air-way through defendants' mine for ventilation of the Bast colliery, they can not be deprived of its use and enjoyment, after expending money in good faith for improvements, which must necessarily be the case, if the defendants allow the breasts in their old workings to fill up with water. This is the strong point of the case.

The plaintiffs claim an easement in the land of the Locust Mountain Coal and Iron Company, worked by and in the occupation of the defendants.

An easement is a right which one proprietor has to some profit, benefit or lawful use out of or over the estate of another proprietor: *Ritger* v. *Parker*, 8 Cush. 145.

It is incorporeal and must consist of two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests: Washburn on Easements, 2; *Perrin* v. *Garfield*, 37 Vt. 312; Taylor on Landlord and Tenant, Sec. 212 and notes. (As to the distinction between easements and servitudes, see Rogers on Mines, 444.)

After the owner has created a servitude or burden upon his lands, he can not restrict the dominant owner in his use and enjoyment of that privilege. It is as much protected as any other vested right, and carries with it every incident to its use and enjoyment; Rogers on Mines, 445; Washburn on Eas. 25, and authorities there cited; 1 Williams' Saunders, 323 and note 6. "Whoever grants a thing, grants all that may be necessary to the enjoyment of the thing itself": Broom's Leg. Max. 362.

When the plaintiffs bought the Bast colliery from Bast & Steinhilbert, for $193,000, one of the chief inducements (according to the affidavit of Mr. Pleasants) was to obtain the right to make this air-way, through the workings of the Little Mine Run colliery.

Mr. Bast obtained that privilege from Taylor & Lindsay, under whom Jeremiah Taylor (who has been made a defendant) claims, and transferred it to the plaintiffs.

The consideration money was one dollar, and both transfers were recorded within the statutory time.

The sale was made by Taylor & Lindsay to Bast on 18th November, 1872, while they were owners of five sixths of the colliery, and in possession. Bast assigned his interest to plaintiffs on 4th December, 1872; both instruments were recorded on 26th February, 1873. Jeremiah Taylor bought out Robert Taylor and Robert M. Lindsay's interest in the colliery 1st January, 1873, and he objects to the exercise of this right on the ground of notice.

Are the instruments within the operation of the recording acts?

The act of 18th March, 1775 (Purdon's Dig. 472, pl. 76) requires all deeds and conveyances made in this State of or concerning any lands, tenements or hereditaments whereby the same may be in any way affected in law or in equity, to be acknowledged and recorded in the county where such land lies, within six months after execution of such deeds and conveyances. This includes any agreement concerning lands, though not under seal: *Hellman* v. *Hellman*, 4 R. 440; *Shortz* v. *Unangst*, 3 W. & S. 54; *Funk* v. *Haldeman*, 3 P. F. S. 244. These instruments were concerning the land, and are clearly within the operation of the recording act.

The sale of this right was good as against R. Taylor and Lindsay, for they, as tenants for years, had authority to grant the easement: *Wallace* v. *Fletcher*, 30 N. H. 453.

And as these instruments were placed on record within six months, they were notice to Jeremiah Taylor. The right attaches to the estate, and not to the owner of the dominant tenement; and the easement followed the estate in the hands of the assignee: Taylor on Landlord and Tenant, Sec. 238.

Jeremiah Taylor, therefore, took no greater interest in the colliery than Robert Taylor and Lindsay had at the time of the purchase. He took the operation not only subject to the covenants and conditions of the lease, but to all the restrictions placed upon it by its grantors. He took it subject to the charge, and the servient tenement followed in his hands: Taylor on Landlord and Tenant, Sec. 238.

But Steinhilbert objects that he did not sign the instrument of 18th November, 1872, and should not be affected by it.

But this fact in my opinion can not avail him under the circumstances of this case, for he was cognizant of the sale at

the time; his interest in the East colliery was enhanced by it, and he made no objection to it: *Qui non prohibit quod prohibere potest assentire videtur.*

It is therefore contended by the plaintiffs, that it was the act of the partners within the scope of the firm's authority, ratified by Steinhilbert, and as such it is to be regarded as his own act: Story on Partnership, Secs. 120, 121, 122; *Cady* v. *Shepherd*, 11 Pick, 400; *Skinner* v. *Dayton*, 19 Johns. 513; *Grum* v. *Seaton*, 1 Hall Rep. 262; *Lord Lovelace Case*, W. Jones, 268; *Orr* v. *Chase*, 1 Mer. 729; 4 Term Rep. 313.

I think if he stood by and saw the plaintiffs pay more for the colliery than they otherwise would have paid without that privilege, and made no objection to it, but received the additional profit, it would be a fraud upon the plaintiffs to permit him to object now, and he is estopped from repudiating that contract upon every principle of equity: *Nass* v. *Vanswearingen*, 10 S. & R. 146; *Rerick* v. *Kern*, 14 S. & R. 271; *Hill* v. *Epley*, 7 C. 331, 334; *Commonwealth* v. *Moltz*, 10 Barr, 527, and cases cited; *Meason* v. *Kaine*, 17 P. F. S. 126; *Miller* v. *Miller*, 10 P. F. S. 16.

The title then of the plaintiffs to this easement or privilege is complete, and the right to exercise and enjoy it is just as effectual in law as if they had paid a million of dollars for it.

Having this undoubted privilege, can the defendants now allow the mines to be flooded with water, and plaintiffs be deprived of their legal rights, without any default on their part? Before this can be done, it would seem right that reasonable notice should be given by the defendants of their intention, to enable the plaintiffs to put up sufficient machinery to pump out the water, if by allowing the water to fill up the easement would be destroyed: 37 Eng. Com. Law Rep. 255; 6 Bing. N. C. 256.

The servitude which the defendants created on their colliery, and the principle of the common law, *Sic utere tuo ut alienum non lædas*, require such notice to the owner of the dominant tenement.

This appears to be recognized by the defendants themselves, for Jeremiah Taylor says in his affidavit, that a written notice of their intention to abandon the mines on the 1st September, was given the plaintiffs on the 14th August last.

This certainly was not reasonable notice for the work required to be done, for the bill alleges that it requires a year with dispatch, and the defendants have not denied or controverted that fact.

It is argued that under the act 16th June, 1836 (Purdon's Dig. 590, P. L. 789), and its supplements conferring chancery powers on our courts, an injunction is a preventive remedy, and can not be used preliminarily to enjoin the performance of any act.

It, no doubt, is a restrictive or prohibitory process to compel the party to maintain his status: *Mammoth Vein Coal Co.'s Appeal*, 4 P. F. S. 183, per THOMPSON, J.; *Farmers R. R. Co.* v. *Reno Co.*, 3 P. F. S. 224, per STRONG, J.; except upon a final hearing when the injunction becomes mandatory: *Audenreid* v. *Phila. & Reading R. R. Co.*, 18 P. F. S. 370, per SHARSWOOD, J. But when the agreement of parties requires performance, the remedy falls within the terms of the sixth clause of the second specification of the 13th section of said act, P. L. 790, which confers upon the courts jurisdiction to afford "specific relief," when the recovery of damages would be inadequate.

For instance where certain acts upon a preliminary hearing have been required to be done, see *Lane* v. *Newdigate*, 10 Vesey, 193; *The Baptist Congregation* v. *Scannel*, 3 Grant, 48; *Hepburn* v. *Landner*, 2 Hem. & Mil. 321. See also 3 Blackstone's Com. 426, 427 and 428, and notes by Judge SHARSWOOD; *Lewis* v. *Comeford*, 1 Vesey Jr., 235, and notes; Fry on Specific Perf., Secs. 765-6-7; *Newmarch* v. *Brandling*, 3 Sw. 99; 4 Sim. 13; *Whittaker* v. *Howe*, 3 Beav. 383; *Mexborough* v. *Bower*, 7 Beav. 127.

But this is different, for the plaintiffs have an easement through the workings of the defendants.

This is established by the bill, affidavits and transfers, and nowhere denied. Jeremiah Taylor says, "that he and his partner never objected to the plaintiffs' using the air-hole to ventilate their mines, nor to the plaintiffs' pumping the water out of the slope level." This concedes the plaintiffs' right as fully as the written instruments establish it, and places them in a position, if this water became a nuisance, to apply for this writ on those grounds: *Rhea* v. *Forsyth*, 1 Wr. 507.

See Bainbridge on Mines, 509, where mines are in danger of being ruined. See *King* v. *McCully*, 2 Wr. 76, where Judge THOMPSON recognizes this position when the "right is clear and undoubted." It is such a right that upon refusal to comply with the terms a court of equity might decree specific performance. Having this privilege or right, then the law is well settled that the dominant owner may go upon the land and do necessary repairs: *Rogers* v. *Morris*, 452; Washburn on Easements, 25, 265, 566, 557; Taylor on Land. and Ten., Sec. 214. For the express grant of an easement is accomplished by certain secondary easements, necessary for the enjoyment of the principal one: Gale and Wheatley on Easements, 231.

By the civil law the right to a servitude drew with it the right to do whatever was required for the fullest enjoyment of the servitude, and a man having that right might enter upon his neighbor's soil for the purpose of doing necessary work, but the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labor might have done to the servient tenement: Ib. 25; *Prescott* v. *Williams*, 5 Met. 429; *Prescott* v. *White*, 21 Pick. 341. (As to abatement of nuisance, see 6 Wharton, 597.) The plaintiffs having this privilege, these authorities go far to show that they have a right to go on the land for the purpose of enjoying and using this right to its fullest extent, doing as little harm as possible.

In the *Mammoth Vein Coal Co.'s Appeal*, 4 P. F. S. 189, Judge THOMPSON held that it would have been proper to enjoin the defendants, had it been made manifest that the consequence of their operations would have the effect of letting water in large quantities in the plaintiffs' mine. These views are strengthened by Judge AGNEW's opinion in the *Locust Mountain Coal and Iron Co.* v. *Gorrell et al.*, Leg. Intel., 29th March, 1872, before referred to, in which he says: "When the miner in his upper mine in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser upon the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of his gangway into the opening thus struck, if by reasonable means

he can carry the water into his own sump;" and he holds that it is the duty of the upper owner to carry off his water even though a trespass had been committed upon him. He adds: "To adopt the principle that an upper owner is liable for no act done within his own mine and no neglect, because it falls within his own proprietary right, would lead to results disastrous to mining in general, and could not be tolerated."

If equity, upon a preliminary hearing in such case, will require the owner of the superjacent mine to keep out his water though a trespass be committed on his own land, and though he has to do certain acts, how much stronger is the present case, where the owners of the upper mine have sold the right to an air-way which can not be used and enjoyed unless the water is pumped out for a reasonable time.

It will be observed that adjacent owners working the same vein of coal owe no special duty to each other; that subjacent owners have a servient interest and superjacent owners a dominant interest; that a subjacent owner must receive the water in its natural channel downward, and must leave a pillar to support the works of the superjacent owner; while the superjacent owner, working his mine with care and in the most approved method, is not required to control the natural flow of the water (the common enemy of the miner,) and may work his coal down to his line. When, however, the superjacent owner, has created a servitude upon his land in favor of the subjacent owner, such as a right to pass over it, or the right to make up an air-way through his workings, the relative position of the parties changes. The subjacent owner then ceases to be servient and becomes the dominant, and the superjacent owner becomes the servient, so far as the terms of their agreement prescribe the rights to the use of the same under it. This conclusion appears to be undeniable and gives the plaintiffs the advantage of the decisions upon this point; for if they have this right they should have some remedy if it be infringed.

In the absence of any adjudged case like the present one, it may well cause the mind of a chancellor to hesitate, not only on account of the magnitude of the interests involved, but for the principle of law to be established.

Should I, therefore, refuse the injunction, the plaintiffs

would have no remedy, as it is an interlocutory order, and no appeal lies (*Kilbish* v. *Catherman*, 10 P. F. S. 444), and before a final decree could be made the mines of the plaintiffs would be irreparably destroyed; unless I should dismiss the bill before answer and final hearing, which the equities of the plaintiffs do not warrant. If the works be allowed to fill up, there would accumulate many millions of gallons of water, and with this superincumbent weight, the pillar or rib of coal at the top of the lower works must ultimately sink, and wide-spread ruin to the property of the plaintiffs and destruction to the lives of the men must inevitably follow.

I prefer, therefore to be reversed (if in error), rather than by sustaining myself by an interlocutory order (if the law were otherwise) to cut off the appeal of the plaintiffs. The weightiest reasons show that this is a case for the Supreme Court, in order to ascertain how far a court of equity may preliminarily go in affording specific relief, where a recovery in damages would be inadequate, where the right is clear and undeniable; where the loss would be irreparable and of great magnitude, and where the danger to life is inevitable.

If I allow the injunction to remain in the meantime to prevent the water from accumulating, at plaintiffs' expense, the defendants have an immediate remedy by appeal, without affidavit or security, and their damages can be readily compensated, for sufficient and approved bail has been entered to indemnify them; and as the Supreme Court have the final decision of this case, let them assume the responsibility.

And now, October 27, 1873, this cause came on to be heard at this term, and was argued by counsel, and thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows: that the special injunction issued against the defendants remain until further order.

AHREN v. THE DUBUQUE LEAD AND LEVEL MINING CO. ET AL.

(48 Iowa, 140. Supreme Court, 1878.)

[1] **Statutory bounty on drainage.** The statute of Iowa allowing to all persons providing drainage for lead mines a royalty of one tenth of all the mineral extracted from the mines benefited, *held* constitutional.

Principle involved in its construction. The principle involved is the same as in cases of party walls and partition fences, and merely provides compensation for benefits received which ought, *ex æquo et bono*, to be paid for.

Appeal from the Dubuque District Court.

The petition alleges that plaintiff is the owner of certain mineral lands, and leased the same to the defendant, the Dubuque Lead and Level Company, on condition of receiving one fifth part of all mineral raised; that defendant has raised a large amount of lead ore, and that plaintiff is entitled, under the law, to recover the value of one fifth thereof. Defendant Chamberlain intervened in the action, and answered the petition, alleging that "he is now, and previous to the time of raising the mineral claimed by plaintiff was, the owner of an adit level running through the premises of plaintiff, made for the purpose of draining the mineral lands through which it runs, including the lands of said plaintiff; that by said level the lands of plaintiff were drained of water, and by reason thereof the mineral * * * * * was obtained and raised, and the lands rendered productive and available for mining purposes, and under the laws of Iowa this defendant, as the owner of said level, is entitled to one tenth of the mineral."

A demurrer to this answer was overruled, and from the decision thereon plaintiff appeals.

WILSON & O'DONNELL, and GRIFFITH & KNIGHT, for appellant.

SHIRAS, VAN DUZEE & HENDERSON, and FOUKE & LYON, for appellee.

[1] *East Saginaw Co. v. East Saginaw*, 13 Wall. 373.

BECK, J.

1. The questions raised by the demurrer involve the constitutionality of the statute under which defendant claims to recover one tenth of the mineral as owner of the adit level. Our attention, therefore, is directed to the consideration of that statute, which is as follows, being Code, § 1229:

"Any person or corporation, who, by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead-bearing mineral lands or lead mines of water, thereby enabling the miners and owners of mineral interest in said lands to make them productive and available for mining purposes shall be entitled to receive one tenth of all the lead mineral taken from said lands, as compensation for such drainage."

The three following sections prescribe the remedy that may be pursued to recover the mineral, or the value thereof, by the person or corporation draining lands as contemplated by this section.

Two sections next following give the right of way for the purpose of carrying the water away from the mineral lands, and provide for the means of determining the compensation to be paid the land owner.

Plaintiff insists that this statute is unconstitutional, in that under its provisions a citizen may be deprived of his property without due process of law, and his property may be in a compulsory manner taken by another for private purposes.

Certain familiar principles applicable to the judicial interpretation of the constitution may properly be stated here. They demand, for their support, neither the citation of authorities nor argument, for they are familiar to the profession.

Courts will declare statutes unconstitutional only in cases that are free of well founded doubts. If a statute be capable of a construction that will remove constitutional objections, it will be adopted instead of a different construction which would bring the law in conflict with the constitution. If a statute have different provisions, some of which are unconstitutional and others constitutional, the latter will be supported and enforced.

So, if separate provisions of a statute or separate statutes, *in pari materia*, are not all constitutional, those which are will be enforced.

It is argued that those provisions of the code conferring upon the owner of an adit level the right to take and condemn the right of way over lands, and to construct shafts and air-holes, are in conflict with the constitution under prior decisions of this court. It is unnecessary to enter into an inquiry upon the question here raised. The pleadings do not show that defendant is attempting to enforce the authority conferred upon him under the section of the code referred to; nor does it appear that he ever has exercised or attempted to exercise that authority. The pleadings show that he is the owner of an adit level. If he in connection therewith has any right of way, we will presume that it has been lawfully acquired in some other way than by condemnation under the statute, if that be unlawful. It, therefore, clearly appears that no question involving the validity of the provisions of the statute authorizing condemnation of right of way is in this case.

2. The only question in the case involves the validity of section 1229, above quoted. We will briefly proceed to consider its provisions, with a view to determine its constitutionality. It authorizes the owner of an adit level to recover a compensation for the benefit his outlay of money and exercise of skill have bestowed upon owners of mines. The work resulted in freeing the mines of water, which had rendered them valueless. It was intended for his own benefit, but so intimate were the relations between his property, whereon the work was done, and the property of the person benefited, that it could not be constructed for his own purposes without conferring benefit upon the other. The mine owner avails himself of the skill and work of the owner of the adit, and raises mineral. *Ex æquo et bono*, he ought to render compensation to the owner, whose outlays have enriched him. The common law will not give to the owner of the adit a remedy. The statute in question does. We are utterly unable to discover any particular where it is in conflict with the constitution. It is identical in principle with the statute regulating party walls and partition fences, and is not unlike the statutes relating to the drainage of swamp and coal lands, and the

change of water courses. The statutes applicable to lost goods and rafts and vessels adrift involve the same principles.

The foregoing remarks contemplate the case of the owner of the adit level holding lands other than by condemnation, under the provisions of the code above referred to, and that he owns, or is a lessee of the land, or in some other way acquired the right to construct the adit. The case presents this aspect, for, as we have before said, the pleadings do not show how defendants acquired the possession of the land upon which his work is situated. We are required to presume, in the absence of a showing to the contrary, that he acquired it lawfully. If he could not acquire it under the statute, then we must presume he did not.

The objections to the validity of the statute urged upon our attention are indefinite, and rather present general thoughts as to the sacredness of private property and rights, which the law protects, than point out how these are interfered with in an unconstitutional manner by the statute in question. It is said an adit was constructed without plaintiff's knowledge and consent, and its owners are now claiming to take plaintiff's property without his consent. The first statement of this proposition may be admitted as true; the second can not be. The plaintiff is not compelled to work his mine drained by the adit. If he does, the law requires him to render one tenth of the ore, or its value, as compensation for the benefits he derives from the adit. There is no taking of private property, but the recovery of compensation for benefits rendered. It is an entirely voluntary matter with the plaintiff to work his mine, and thus be brought under obligation to render compensation to defendant. The law presumes he consents to rendering the compensation when he avails himself of the benefits for which the law declares he shall render compensation. The fact that the adit was constructed without plaintiff's knowledge and consent in no manner affects his rights. A bridge or a mill is built without the knowledge or consent of those who use it, yet when a man crosses the one or has his grain ground at the other, he is under obligation to pay the tolls fixed by law.

It is urged against the validity of the statute, that it fixes the compensation to be rendered to the owner of the adit. It

is insisted that this invalidates the statute. It is claimed that the compensation ought to be determined by a court and jury, or the legislature ought to provide some other tribunal to assess the compensation to be paid for the benefits received from the adit. This position does not deny the right of the legislature to provide for the recovery of compensation, but assails the statute as unconstitutional, on the ground that the compensation is fixed by the legislature itself.

The objection is most manifestly unsound. The legislature can fix the tolls to be charged by mill owners and the owners of bridges, the charges to be made by the owners of wharves, docks, elevators, etc., and can prescribe a tariff of freights to be charged by railroad corporations. It is not claimed that a court and jury, or other tribunal, shall be called upon to determine the compensation to be charged in such cases: *Dubuque* v. *Stout*, 32 Iowa, 80; *Dubuque* v. *Stout*, Id. 47; *Munn* v. *Illinois*, 4 Otto, 113; *C., B. & Q. R. Co.* v. *Iowa*, Id. 155; *Peik* v. *C. & N. W. R'y Co.*, Id. 164; *Winona & St. Peter R. R. Co.* v. *Blake*, Id. 180. These cases, so far as they involve legislative power, are not different from the one before us.

It is said, with earnestness, indicating alarm, that if the legislature may prescribe one tenth, it may one half or the whole of the mineral raised by the owner of a mine, compensation to be paid to the proprietors of the adit. It is not at all permissible for the courts to rob other branches of the government of their constitutional authority, on the ground of a fear that in some imaginary case the power may be oppressively exercised. We must presume that legislative authority will always be fairly, justly and constitutionally exercised.

The legislature has authority to determine the compensation to be given the owner of the adit; the courts must presume the determination is just.

The cases above cited abundantly support the position that if the legislature possesses the power to authorize the owner of the adit to collect a compensation from those benefited by the work, and impose an obligation upon the person benefited to pay, it has the authority to fix that compensation.

It is said that the statute, in providing a per centum of the

mineral as a compensation, can not operate justly or equally in all cases, for the compensation ought to be greater in some cases than in others. This may all be admitted. The doctrine, if adopted by this court, would lead us to hold the statutes authorizing fixed rates of tolls for ferries and bridges, those providing for tolls to be collected by mill owners, and those fixing compensation for recovery of rafts and vessels adrift, all unconstitutional. In some cases the persons receiving compensation would realize more for their outlays and labor than would be received in other cases. But these statutes have never been assailed on this ground. No case can be found where a court has refused to support a law on the ground that it operated unjustly in some cases—was not so framed that it would have an equal operation in all conceivable cases. The courts inquire whether the legislature has the authority to enact a statute. If the power is found, they do not inquire into its operation and hold it void because of some imaginable inequality that may occur in its enforcement. But we have devoted more time to this branch of the case than it merits.

3. It is said that the pleadings do not show that the owner of the adit constructed it for the purpose of raising mineral from his own land; that unless he holds an interest in mineral he could not have such community of interest as would make the plaintiff liable to him for compensation on account of the benefit enjoyed.

This point was not made in the court below, and can not really arise upon the record. The demurrer to defendant's answer was based upon the ground, and no other, that the act under which defendants claim the mineral is unconstitutional. The extent or nature of defendant's interest in the mineral affected by the adit, or whether he had or had not any such interest, were not matters alleged or denied by the pleadings preceding the demurrer. The objection under consideration goes to the rights of defendant under certain conditions—that is, he can have no right which a court will enforce unless he has an interest in the mineral affected by the adit. This, it will be at once seen, involves a matter of fact. No such fact is presented or denied in the pleadings, and the absence of allegations in respect to it is not a ground of demurrer.

There can exist no reason for disturbing the decision of the court below, whatever conclusion we may reach upon this point.

In view of the fact that the point has been fully discussed by counsel of both parties, we present briefly our conclusions thereon.

As we regard the law, defendant's rights can not be based on any community of interest between him and plaintiff, but rather upon the fact that plantiff is benefited by a work which it was lawful for defendant to do, that is, a work having for its object the draining of all the mines generally in that locality.

Is such a work for such an object lawful? We can not doubt that it is, for this reason: it bestows benefits upon owners of mines, by enabling them to obtain valuable metals that were before inaccessible; it restores, as it were, to them their property. In this view, the adit owner acts the part of the finder of lost property, or of one who takes a vessel adrift. Surely the statute which enforces compensation from the owner that has been benefited can not be unconstitutional. It is identical in principle with the statute relating to lost goods and water craft. If there was no statute on the subject, it can not be doubted that one by means of an adit might lawfully drain all the mines in his neighborhood. The owners, *ex bono et æquo*, ought to compensate him. But in the absence of a statute he can not recover compensation. The section of the code cited is intended to compel the mine owners to do that which in good conscience they ought to do.

The act of building an adit is lawful, for the reason that it is a matter of public interest, and of great public good. To develop wealth by uncovering the mines of rich metals tends to promote public prosperity.

We conclude that, however obnoxious the other provisions of the code relating to the rights of the owner of an adit may be, the section authorizing him to recover compensation from the owners of mines for the benefits they have received from his skill and outlays, is not unconstitutional. Surely we may hold it is not so plainly and palpably in conflict with the supreme law of the State, and upon the question there is not such absence of doubt that we are required to hold it invalid.

Affirmed.

ROTHROCK, Ch. J., dissenting.—Believing that the foregoing opinion is fundamentally wrong, and that the principles therein announced, if carried to their logical results, will seriously impair the property rights of the citizen, I will, as briefly as can be done consistent with the importance of the question involved, give the reasons for my dissent.

The provision of the constitution of this State, that "no person shall be deprived of life, liberty or property without due process of law," is substantially the same as that contained in the amendments to the federal constitution, and in the constitutions of the several States. These provisions are familiar not only to the legal profession but to the public at large, and are justly regarded as the great safeguard of the liberties of the people. "In *Magna Charta* they were wrested from the king as restraints upon the power of the crown; with us they are imposed by the people as restraints upon the power of the legislature." If disregarded by the courts, the life, liberty and property of the citizen are at the mercy of arbitrary power.

It may seem that these remarks betray unnecessary alarm, in view of the small importance to the public of the question whether appellant, in this case, shall deliver to appellee one tenth of the lead ore raised from the mine upon appellant's land. But when the principles of the foregoing opinion come to be applied to other greater and more varied interets affecting the public at large, it will, in my opinion, be just cause for serious apprehension.

What is "due process of law?" It is properly defined as "law in its regular course of administration through courts of justice." Bouvier's Law Dic., Vol. I, 512; Story on the Const. 264, 661; 18 Howard, 272; 13 New York, 378.

It does not mean the act of the legislature which deprives the citizen of his life, liberty, or property. If such is its meaning, a fair construction of the constitution would be, that no person should be deprived of these rights unless the legislature should pass a law taking them away. This would be an absurdity; and with such construction the constitutional limitation of power would be a barren ideality, utterly meaningless.

It is said in the majority opinion that the statute in

question is identical in principle with the statute regulating party walls and partition fences, and is not unlike the statutes relating to the drainage of swamp and overflowed lands, and the change of water courses.

As I read these statutes they are wholly unlike the one under consideration, so far as the authority or power attempted to be exercised by the legislature is involved. In each and all of them, the legislature has provided a tribunal clothed with judicial power, to determine what the owner of the property shall pay for the benefits received. What would be thought of these statutes if their provisions should arbitrarily fix the value of a brick partition wall at so much per foot, or the value of a partition fence at so much a rod, or, to make an illustration more pertinent to the question before us, require the owner of land reclaimed by a drain or ditch to give to the proprietor of the drain or ditch one tenth of the corn grown upon the land, without regard to the value of the corn, or the cost of constructing the ditch, and without regard to whether the owner of the land consented to the making of the ditch or drain? With due deference I submit that if legislation of the character supposed is not depriving the citizen of his property without due process of law, then it is competent for the legislature to enact that a person may become indebted without his consent, and require him to pay the debt in property at a certain fixed and arbitrary value.

The majority opinion also likens the law in question to the statutes applicable to lost goods, and rafts and vessels adrift. It must be admitted that these statutes are in principle the same, with this important exception: The finder of lost property, and one who takes a vessel adrift, is, under the statute, entitled to a percentage of the value of the property, while in the statute under consideration, one who constructs an adit level is entitled to one tenth in kind of the mineral reclaimed, without regard to its value. This tithing is required to be paid as long as the mine shall be worked, without regard to the rise and fall in the market price of the mineral. I know of no case where the question as to the validity of the statutes applicable to lost goods and vessels adrift has been raised; but in so far as they attempt to fix an arbitrary compensation to the finder, I think they are void.

The opinion further holds that the objection that the legislature has no power to arbitrarily fix the compensation is most manifestly unsound, because it has been held that the legislature may fix the tolls to be charged by mill owners, and the owners of bridges, the charges to be made by the owners of wharves, docks, elevators, etc. and can prescribe a tariff of freights to be charged by railroad corporations.

All this must be admitted; and yet I think these powers of the legislature are based upon a different principle from the statute under consideration. They are intended to protect the public against exorbitant and unreasonable charges made by powers and corporations, who have a monopoly of certain lines of business, and to fix a limit beyond which they shall not charge for certain services. They do not exact anything from the citizen without his consent. By such legislation no person is required to take his grain to a mill, or his freight to a railroad. He can use his own property as he sees proper, and no one, without his act, has the right to demand one tenth, or any part of it. In the case at bar, the owner of the land, whose right to the sole and exclusive possession extends to the center of the earth, is required to deliver one tenth in kind of his mineral, without regard to its value, to some one who has drained his land without his consent. He must either do this or cease to use his own property in his own way. He is told if he digs in his own soil, and piles up the earth on his own land, he must deliver to another one tenth of the fruits of his labor for a benefit to the land, by reason of the drain, and his lips are sealed against disputing the justice of the compensation. I deny that another can be empowered by the legislature, without his consent, to construct a drain and then control the exercise of his rightful dominion over his own land, by requiring him to pay tithes.

The majority hold that the legislature has the authority to fix the compensation to be given to the proprietor of the drain at one tenth of the mineral reclaimed and raised, and the courts must presume the determination of the legislature is just. Suppose that the statute required appellant to give one half, or all the mineral raised. As, in the opinion of the majority, the power to fix the amount is in the legislature, must the courts still presume that the determination of the legisla-

ture is just? At what point in the exercise of this power may this presumption become disputable?

If the power be conceded to be in the legislature, and the courts must presume it has been justly exercised, there is no middle ground between a reasonable compensation and total confiscation. Just compensation, and that only, can be recovered, and this case be determined by a judicial tribunal, and in no other constitutional manner.

SEEVERS, J., concurs in this dissent.

MCCORMICK ET AL. V. HORAN.

(81 New York, 86. Court of Appeals, 1880.)

Abstract right to use of water course—Compelling stream to carry foreign water. The rights of a riparian owner are not confined to the stream as it flows in a state of nature nor to the mere natural drainage; he may confine, control and accelerate the flow, or increase the volume of water which reaches the stream in the reasonable use of his premises, without liability to the lower proprietor.

[1]**Application of the rule to pumping from quarry—Injunction to prevent obstruction of stream.** Plaintiffs owned a quarry on land on which rose a small stream. The water collected in the quarry pits, and when the quarry was worked it was pumped into the stream bed and flowed off the same, to a practical extent, as it would have done at first had there been no quarry there. Defendant obstructed the stream so as to throw it back on plaintiffs' land. *Held*, that an injunction would lie to prevent further obstructions and to compel the removal of the obstructions already placed.

Appeal from judgment of the general term of the Supreme Court, fourth judicial department, affirming judgment in favor of the plaintiffs, Nelson McCormick and others, made on the trial at special term.

The action was brought to restrain the defendant, Patrick Horan (appellant), from obstructing the flow of water in a water course from the land of plaintiffs to and across the land

[1] *Ramsay* v. *Chandler*, 4 M. R. 240.

of defendant below, and to compel the removal of obstructions placed by him in the stream.

Plaintiffs operated a quarry upon their own land near said stream, which started from a spring on the same land. After the land over which the stream passed had been cleared, and many years before the acts complained of, plaintiffs had ditched the stream to defendant's line and the then owner of defendant's ground continued the ditch across the same. It was finally walled over, and would hold all the water that originally ran in the stream except at times of high water.

Plaintiffs worked their quarry during the summer season, and had at the time of the occurrence in question excavated about three fourths of an acre to a depth of from five to twelve feet. Small water courses were cut in the progress of the excavation; the water therefrom ran into the bed of the quarry. In the winter the snows drifted into the quarry and melted; in the spring the surface waters from the surrounding lands also flowed into it. The waters so accumulating in said quarry, if it had not been excavated, would naturally descend and flow into said water course. In the spring of each year plaintiffs pumped the water from the quarry into said water course. The court found that the flow of water while the pumps are at work is increased in amount, but that the flow is no greater than in the earlier spring months, and that the capacity of the water course as it runs in said ditch is ample to carry off all the water pumped therein at any time, together with the other water running therein. In May, 1876, and before plaintiffs had begun to pump the water from their quarry, defendant took up the stone covering of the ditch upon his land, filled it with earth and stone so as to prevent the flow of water therein, and built a dam across said water course, near the line between his and plaintiffs' land, which prevented the flow of any water therein until the water had risen to the top of said dam, thereby causing the water to set back into and fill up plaintiffs' quarry, and to overflow their adjoining lands.

W. F. Cogswell, for appellant.

Plaintiffs had no right to discharge the water from their quarry in the unnatural manner and unusual volume adopted by them, upon the defendant's land: 1 Domat (Cushing's ed.)

§ 1583, p. 616; *Bellows* v. *Sackett*, 15 Barb. 96; *Bellinger* v. *New York Cent. Railroad*, 23 N. Y. 42; *Clinton* v. *Myers*, 46 Id. 511; *Merritt* v. *Parker*, 1 Coxe (N. J.), 460; *Tillotson* v. *Smith*, 32 N. H. 90; Washburn on Easements, 262, § 17; *Mayor, etc., of Baltimore* v. *Appold*, 42 Md. 442; *Pettigrew* v. *Evansville*, 25 Wis. 223; *Baird* v. *Williamson*, 15 J. Scott (N. S.), 391 (15 C. B.); 109 Eng. Com. L. 391; *Smith* v. *Kenrick*, 7 G. & S. 515; 62 Eng. Com. L.; *Clinton* v. *Myers*, 46 N. Y. 511. As its continuance for a sufficient length of time would ripen into a right by prescription, defendant had the right to prevent it by legal proceedings, or by resorting to any device, or the erection of any structure which would stop the same, and which he could construct and maintain without a breach of the peace: *Merritt* v. *Parker*, 1 Coxe (N. J.), 460; *Tillotson* v. *Smith*, 32 N. H. 90; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. 191.

S. E. FILKINS, for respondents.

The channel, or water way, from the spring on plaintiffs' land, across defendant's land, and thence northward, was a legal water course: *Shields* v. *Arndt*, 3 Green's Ch. (N. J.) 246, 247; Washburn on E. & Serv., 3d ed., 279; 39 Conn. 180; Ang. on Wat., § 206, etc., 6th ed.; *White* v. *Chapin*, 12 Allen, 516. A superior proprietor may increase or change at intervals the flow of water in a water course, although damage result to an inferior proprietor: *Waffle* v. *Porter*, 61 Barb. 130; *Waffle* v. *N. Y. C. R. R.*, 58 Barb. 413; 53 N. Y. 11; *Pollett* v. *Long*, 58 Barb. 21; *Williams* v. *Gale*, 3 H. & J. 231; Ang. on Wat., § 108 j, 6th ed.; *Buffam* v. *Harris*, 5 R. I. 243; 21 Barb. 230; 6 Ohio St. 188; 9 Id. 503; 12 Id. 392; 2 Kent's Com. 439, n.; Wash. on Eas., 3d ed., 296, 372; old ed. 219, 282; 17 Barb. 654; *Hayes* v. *Waldron*, 44 N. H. 580; 29 Wis. 254; 2 Exch. 9; *Broadbent* v. *Ramsbotham*, 11 Exch. 602; Ang. on Wat., 6th ed., § 108; Wash. on E. & S., 3d ed., 280; *Swett* v. *Cutts*, 50 N. H. 439; *Buffam* v. *Harris*, 5 R. I. 243, 253. Plaintiffs were properly allowed a mandatory injunction compelling the defendants to remove the obstruction: 40 N. Y. 191; 4 Lans. 47; Angell on Water Courses, § 456.

ANDREWS, J.

Water courses are the means which nature has provided for the drainage of the country through which they pass, and from the natural servitude of lands upon a water course to receive the waters flowing therein from the lands above, springs the right of the owner of the superior heritage to have the water from his lands, of which the water course is the natural outlet, drained into, and carried off thereby, and the duty of the owner of the inferior and servient tenement not to interfere with or obstruct its passage. But the right to the use of a water course for the discharge of surface or other waters exists only in respect of waters of which the water course is the natural outlet, and it does not justify the diversion and turning of the water of one stream into another, not its natural channel, thereby subjecting lands on the stream into which the diversion is made, to the servitude or easement of a water way for the water thus discharged into it. This is the principle upon which several of the cases to which the appellant refers were decided, and they have no application to the case before us: *Merritt* v. *Parker*, 1 N. J. 460; *Tillotson* v. *Smith*, 32 N. H. 90; *Mayor, etc., of Baltimore* v. *Appold*, 42 Md. 442.

The right of an owner of lands, through which a water course runs, to have the same kept open, and to discharge therein the surface water, which naturally flows thereto, is not, however, limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements. The owner of lands drained by a water course may change and control the natural flow of the surface water therein, and by ditches or otherwise, accelerate the flow, or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor: *Waffle* v. *N. Y. C. R. R. Co.*, 53 N. Y. 11; *Miller* v. *Laubach*, 47 Pa. St. 154. This right is subject to the qualification that one owner can not, by artificial arrangements on his land, concentrate and discharge into the stream surface water in quantities beyond the natural capacity of the stream to the

damage of other owners: *Noonan* v. *City of Albany*, 79 N. Y. 470. The interests of society are prompted by the cultivation and improvement of the soil, the working of mines, and by other industries connected with the use of land, and the rule of law does not prevent the use of water courses for artificial drainage, although the volume of the stream is thereby somewhat enlarged, and the water is discharged at a different time or manner from what it would be if the land was kept in a state of nature, provided no material injury is occasioned to other riparian owners. These views are decisive of this case. The plaintiffs, in opening the quarry on their premises, were exercising a lawful right. The excavation made formed a reservoir into which the surface water from the contiguous lands collected, and in the spring when the plaintiffs commenced their operations, they pumped this water, together with that arising from the melting snows, and what came from the small water courses cut off by the excavation, into the water course, which lower down crossed the defendant's farm.

The court found that this water, if the excavation had not been made, would have naturally descended and flowed into the stream, and that although the flow of water, when the pumping was going on, was greater than it otherwise would have been, the natural capacity of the water course was sufficient to carry off the water pumped into it, together with the other water running in the stream, and there was no finding that the defendant sustained any damage from the acts of the plaintiffs.

Under these circumstances, the act of defendant, in filling up the channel and obstructing the flow of water, was unlawful, and the judgment should therefore be affirmed.

All concur except DANFORTH, J., taking no part, having been of counsel.

Judgment affirmed.

1. The natural right of surface drainage as between adjoiners on upper and lower slope: *Gormley* v. *Sanford*, 52 Ill. 158; *Ogburn* v. *Connor*, 46 Cal. 347.

2. The value of waste water supplied from a mine is its value to the purchaser: *Chicago Co.* v. *Northern Co.*, 36 Ill. 60; *Post* WATER.

3. Liberty to make drain through lands carries the right to enter and repair: *Hodgson* v. *Field*, 7 East, 613; 3 Smith, 538. And the grant of drainage right to a colliery is not limited to the ground originally worked: *Id.*

4. To what extent lower mine subject to drainage of the upper: *Horner* v. *Watson*, 79 Pa. St. 242; *Post* SURFACE SUPPORT; *Baird* v. *Williamson*, 4 M. R. 368.

5. Drainage by percolation as affected by previous grant of water rights, *Johnstown Co.* v. *Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Bliss* v. *Greeley*, 45 N. Y. 671, 6 Am. Rep. 157.

6. Destruction of springs by mining *held, damnum absque injuria; Trout* v. *McDonald*, 83 Pa. St. 144; *Post* LEASE. *See* FLOODING.

7. Liability for deposit of debris on the land below; *Robinson* v. *Black Diamond Co.*, 57 Cal. 412; *Same* v. *Same*, 50 Cal. 460; *Post* TAILINGS.

8. The Drainage Statute of California construed with reference to mining debris: *People* v. *Parks*, 58 Cal. 624.

RALSTON ET AL. v. PLOWMAN.

(1 Idaho, 595. Supreme Court, 1875.)

[1] **No right to dump on another's ground.** In the absence of local custom allowing it, no person can run his tail race or sluicing flume over the claim or dumping ground of a stranger, and no damages can be recovered against a party for filling up such flume by tailings deposited on his own ground.

[2] **Parol evidence of district rules.** Parol evidence of mining customs can not be received when there are written rules in force on the same subject.

Legality of mining customs a question for the court. It is error to allow a jury to pass upon a question of law; and whether or not mining customs are contrary to law is such a question, and should have been determined by the court.

Appeal from the District Court of the Second Judicial District, Boise County.

GEORGE AINSLIE and HUSTON & GRAY, for the appellant.

R. E. FOOTE, for the respondents.

HOLLISTER, J., delivered the opinion.

WHITSON, J., concurred.

In this case the court permitted parol evidence to be given of the local mining customs, when it appears from the record that the regulations of the locality or mining district were recorded in the proper office, according to the laws relating thereto. The court gave to the jury an instruction that they were to find a verdict according to the mining customs, if such customs were not contrary to law.

In both these respects we think the court erred. It is well settled, that where there is record evidence which can be obtained of any fact material to the issues, such evidence can only be received because it is of a higher character than parol testimony. To admit evidence of a secondary character where higher evidence of the fact is attainable, against the objections of the opposite party, is erroneous. It was not competent for the jury to determine for themselves whether mining customs were or were not contrary to law.

[1] *Esmond* v. *Chew*, 5 M. R. 175.
[2] *King* v. *Edwards*, 4 M. R. 480.

This was a question of law, for the court to determine, and should have been settled as such before giving the case to the jury. If the customs were contrary to law, they had no validity, and should not have been given to the jury to pass upon. If not contrary to law, the jury should have been instructed that upon finding certain facts, they should find accordingly in their verdict.

The court also instructed the jury if they found the plaintiffs' version of the case to be correct they should find a verdict in their favor. This was erroneous. A verdict is not to be determined by the opinions or views of the jury as to what a party's version of a case may be. Such version may or not be supported by the evidence.

It may be entirely erroneous, and hence, can not be made the foundation of a verdict, unless the facts which the jury find, support it.

The pleadings in a case only make the issues which are presented for the consideration of the jury, and not the evidence upon which the verdict is to rest, and it is for the court to say what facts, if found by the jury from the evidence, shall be sufficient to maintain the case of either party.

The court should instruct the jury, if they find from the evidence such and such facts to be established, then their verdict will be for the party, whichever one it may be, in whose favor they were found. It appears from the evidence in the case that the plaintiffs had constructed a race or covered flume through which they sluiced their tailings from their mines; that such flume ran from their diggings (which were situated above the defendant's mine) some two hundred feet upon the defendant's dumping ground, and that the "dump" therefrom was altogether on defendant's ground, and was two hundred feet below the grounds of the plaintiffs.

The defendant had also constructed a flume of like character from his diggings to a point on his own claim which he used for dumping purposes, not far distant from the place where plaintiffs' flume or race ended, and that the tailings or "dump" of the defendant had filled up or obstructed the plaintiffs' flume to a distance of about one hundred feet, but still a hundred feet or more below the lower line of their claim. It was for this obstruction the plaintiffs brought their

suit and recovered their judgment against the defendant. The evidence showed that the possession and ownership by the defendant, of his claim and dumping ground, was prior in point of time to that of plaintiffs, and that no right had been given by the defendant to plaintiffs to dump their tailings on his ground. Under such a state of facts we are clearly of the opinion, the plaintiffs had no right of action for the filling up of their flume so long as the defendant did nothing to prevent them from dumping on their own grounds. Their race was extended without any right, upon the defendant's grounds, and, so far as the evidence shows, without any necessity. The fall from their washings or mining operations to the lower line of their claim was sufficient to carry off their tailings and to dump them on their own grounds, and under no conceivable circumstances could they claim the right of carrying their flume onto the defendant's premises for the purpose of dumping their tailings thereon without his authority.

For these reasons we are of opinion the judgment of the court below should be reversed and remanded for a *venire de novo*.

1. See TAILINGS.

GRUBB ET AL. V. GUILFORD ET AL.

(4 Watts, 223. Supreme Court of Pennsylvania, 1835.)

Appurtenances—Right to mine in adjoining land. F., seized in fee of a tract of land, sold and conveyed a small part of it to B., in fee, and, by the same instrument, did grant an easement or right to B., "from time to time, and at all times hereafter to dig, take and carry away all iron ore to be found within the bounds of" the residue of the tract not conveyed; "provided the said B., his heirs and assigns, pay to the said F., his heirs and assigns, the sum of six pence per ton for every ton taken from the premises:" *Held*, that such easement or right is not appurtenant to the part of the land conveyed, so that it would pass by a sheriff's sale of the latter.

[1] **Sheriff's sale—Levy.** What property passes to a purchaser at sheriff's sale must be ascertained from the levy under the *fieri facias;* its quantity and character can not be extended or diminished by any subsequent official act of sale or conveyance.

This was an action of trover for twelve tons of iron ore brought by Simeon Guilford and Franklin Wright against Edward B. Grubb and Charles M'Curdy, in the District Court for the City and County of Lancaster, of September term, 1832, No. 19, in which, on the 3d of December, 1833, the jury upon the issue joined returned the following special verdict:

And now, to wit, December 3, 1833, came Thomas Morgan, etc., jurors, etc., who do say that on the 31st day of December, 1749, the proprietaries of Pennsylvania, by their patent, *in hæc verba*, granted to John Forree, in fee, four hundred and two acres and allowance of land in Hempfield township, Lancaster county; that the said John Forree, being so thereof seized, died, having on the 21st day of April, 1753, made his last will and testament, *in hæc verba*, which was, on the 30th June, 1753, duly proved and approved in the register's office, before the register for said county, and letters testamentary in due form of law issued to Henry Strickler, Christian Forree and Abraham Myer, the executors named therein, who, in pursuance of the powers given them by said will did, on the 28th of October, 1765, by indenture *in hæc*

[1] *Quirk v. Falk*, 2 M. R. 19.

verba, grant and convey to David Forree, the son and devisee of the said John Forree, in fee, three hundred and two acres, part of the land included in the patent of the 31st December, 1749; and the said David Forree and Magdalena his wife, by their indenture, *in hæc verba*, dated 2d November, 1791, and recorded on the 26th October, 1792, conveyed to Jacob Heistand, in fee, two hundred and fifty acres of the said tract of three hundred and two acres; and the said Jacob Heistand, by his indenture, *in hæc verba*, dated 8th April, 1816, conveyed to his son, Jacob Heistand, Jun., eleven acres, more or less, of the said two hundred and fifty acres; and the said Jacob Heistand, Jun., being so thereof seized of the said eleven acres, more or less, did, on the 29th September, 1830, by deed duly executed and acknowledged, *in hæc verba*, and recorded on the 1st of October, 1830, convey to Simeon Guilford and Franklin Wright the privilege and right of entering upon and digging and taking away all the iron ore from the said tract of eleven acres; all which, in evidence shown to the jury, manifestly appears; and the said jurors further find that the said Simeon Guilford and Franklin Wright, afterwards, to wit, on the 1st day of September, 1831, entered on the said tract of eleven acres, and there dug and raised or caused to be dug and raised, and placed the same at the mouth of the shafts or pits whereout it was dug and raised, twelve tons of iron ore; which said twelve tons of iron ore so dug and raised by Simeon and Franklin, the defendants, Edward B. Grubb and Charles M'Curdy, on the 1st day of January, 1832, took and converted to their own use, by carrying the same away from the said eleven acres of land; and the jurors further find, that Jacob Heistand, Jun., under whom the plaintiffs claim, and Jacob Heistand, Sen., and David Forree, under whom Jacob Heistand, Jun., claims, have been in the legal and actual possession of the premises, the eleven acres, from which the said iron ore was dug and raised by the plaintiffs and taken and carried away by the defendants, from the 28th of October, 1765, till the institution of this suit.

And the jurors further find that the said David Forree, being so as aforesaid seized of the said three hundred and two acres of land, did, on the 19th day of September, 1768, by

articles of agreement *in hæc verba*, made with William Bennet, agree to sell and convey to the said William Bennet, iron master, twenty acres, a part of the said tract of three hundred and two acres, where ore had been dug, in which articles of agreement it is agreed by David Forree to give William Bennet, his heirs and assigns, the privilege to dig ore on his, the said David Forree's, remaining part of the three hundred and two acre tract, for six pence for every ton, if he, William Bennet, shall have occasion; and the jurors find that the said David Forree, by his deed, dated 6th of March, 1769, *in hæc verba* (but never recorded) did grant and convey to the said William Bennet in fee, twenty acres of land, part of the three hundred and two acre tract devised to him under the will of his father, in which deed the said David Forree covenanted as follows: "And the aforesaid David Forree, for himself, his heirs, executors and administrators, doth covenant, promise, grant and agree to and with the said William Bennet, his heirs and assigns, that he, the said William Bennet, his heirs and assigns, shall and may, from time to time and at all times hereafter, dig, take and carry away all iron ore to be found within the bounds of the said David Forree's tract of land, containing two hundred and eighty-two acres, provided the said William Bennet, his heirs and assigns, pay to the said David Forree, his heirs and assigns, the sum of six pence, Pennsylvania currency, per ton, for every ton taken from the premises of two hundred and eighty-two acres aforesaid;" and the jurors further find that the said William Bennet being so thereof seized, judgment was, by due course of law, obtained against him by James Smith, for a debt of £2,000, in the Court of Common Pleas of Lancaster County, of November term, 1770, No. 175, upon which judgment such proceedings were had, *in hæc verba*, that Frederick Stone, the sheriff of Lancaster county, sold and on the 10th of August, 1771, by his deed *in hæc verba*, conveyed the said twenty acres of land, late the estate of said William Bennet, with the appurtenances, to George Eichelberger, who being so thereof seized, did by his deed dated 14th December, 1771, *in hæc verba*, convey the said twenty acres of land to James Smith in fee, with its appurtenances, who, by his deed dated 29th April, 1788, *in hæc verba*, conveyed the same twenty acres of land, with its appurtenances, to Thomas

Neill, who by his deed of 1st September, 1794, *in hæc verba* conveyed the same premises to John Wilkes Kittera, Esq., who by his deed dated 13th May, 1797, *in hæc verba*, conveyed one undivided moiety of the same premises to Samuel Jago, who, by his deed and the deed of his wife, dated 6th May, 1799, *in hæc verba*, conveyed the said moiety of the said premises to Thomas Neill, and the said John W. Kittera and wife by their deed dated 6th May, 1799, *in hæc verba* (they joining in the deed of Samuel Jago and wife), conveyed to Thomas Neill the other moiety of the said premises, and the said Thomas Neill being so thereof seized, by his deed dated the 5th of May, 1802, *in hæc verba*, conveyed the same twenty acres, with its appurtenances, to Henry B. Grubb in fee, who by his deed dated 18th September, 1804, *in hæc verba*, conveyed the same premises, with their appurtenances, to Jacob Strickler, in fee, excepting and reserving unto the said Henry B. Grubb, his heirs and assigns, all the ore on the premises, as by the deeds in evidence manifestly appears.

And the jurors further find that the said Henry B. Grubb is dead, and the defendant, Edward B. Grubb, is one of his sons and heirs at law, and that Charles M'Curdy, the other defendant, is his agent, and acted under his authority in taking and removing and converting the twelve tons of ore, as before found.

And the jurors do further say that they are ignorant, in point of law, upon which side they ought to find, upon the foregoing facts so found, the issue; or whether, under the facts in the present form of action, they should find in favor of the plaintiffs; that if upon the whole matters the court shall be of opinion that the issue is proved for the plaintiffs, and they can recover in the present form of action, they find accordingly for the plaintiffs, and assess their damages at twelve dollars and the costs of suit; but if the court are of a contrary opinion, then *vice versa*, or for the defendants.

On the 20th day of October, 1834, the court, after argument, ordered the verdict, finding for the plaintiffs, and assessing their damages at twelve dollars and the costs of suit, to be recorded, and rendered therefrom judgment for the plaintiffs, and at the same time delivered an elaborate opinion which is reported in 4 Watts, 226–240, but owing to its extraordinary length is omitted here.

Assignment of error.

Upon the facts found by the special verdict, the defendants were, by law, entitled to the judgment of the court; and there is error in its having been rendered in favor of the plaintiffs.

MONTGOMERY and ELLMAKER, for plaintiffs in error, contended that Forree conveyed the right of mining in the residue of the original tract as an appurtenance to the twenty acres, and it passed as such to Grubb, under the sheriff's deed; they cited, 2 Black. Comm. 20, 34; 3 Kent's Comm. 452; 4 Kent's Comm. 490; Co. Litt. 121, b; 6 Com. Dig. Grant, E., 9, 11; *Hill* v. *West*, 4 Yeates, 142; *Pickering* v. *Stapler*, 5 Serg. & Rawle, 107; *Foot* v. *Colvin*, 3 Johns. Rep. 222; *Smith* v. *Johnston*, 1 Penn. Rep. 471; *Keller* v. *Nutz*, 5 Serg. & Rawle, 246; *Cooper* v. *Smith*, 9 Serg. & Rawle, 33; 1 Penns. Black. 294; 3 Kent's Comm. 448; *Butz* v. *Ihrie*, 1 Rawle, 218; *Nitzell* v. *Paschall*, 3 Rawle, 76; 1 Stark. 305; 6 Cranch, 137; *M'Pherson* v. *Cunliff*, 11 Serg. & Rawle, 427; *Schermerhorn* v. *Von Volkenburgh*, 11 Johns. Rep. 529; 9 Cowen, 52; 1 Wend. 466.

CHAMPNEYS and NORRIS, for defendants in error, were stopped by the court.

The opinion of the court was delivered by

ROGERS, J.

This was an action of trover for twelve tons of iron ore. The ten acres and forty-three perches from which the ore was taken were part of a larger tract of two hundred and fifty acres, which was conveyed to Jacob Heistand, Sen., by David Forree and wife, by their deed of the 2d of November, 1791, being part of a still larger tract of two hundred and eighty-two acres then held by David Forree under the last will and testament of his father, John Forree, who held under a patent dated the 21st of December, 1749, from the proprietors.

Jacob Heistand, Sen., being so seized, on the 8th of April, 1816, conveyed eleven acres of the above described property to Jacob Heistand, Jun., who, on the 27th of September, 1830, entered into articles of agreement with Guilford and Wright.

wherein, for the consideration therein expressed, the said Jacob Heistand granted and assigned to them the sole and exclusive right and privilege to dig, take and carry away all the iron ore, of every kind whatever, to be found upon a certain tract of land belonging to the said Jacob Heistand, containing between ten and eleven acres, etc., with ingress, egress, etc. By this agreement, so far as regards the right of using the land for the purposes therein stated, the plaintiffs have acquired all the interest of Jacob Heistand, with all the powers he might have had in relation to the same previous to the agreement. Now it is clear that Jacob Heistand, as the owner of the fee simple, and his assignees, have the undoubted right to raise ore on the premises, without molestation or hindrance from any one, and more especially from him who stands in the relation of a wrong-doer or trespasser. The title to land can not be tried in an action of trover: 3 Serg. & Rawle, 509; 10 Serg. & Rawle, 119. But it is said that ore when dug and raised is a chattel; and that it is sufficient to defeat the plaintiff's action to show either that the title is in the defendants or in some third person: 11 Johns. Rep. 529; 9 Cowen, 52; 1 Wend. 466. It is not disputed, as a general principle, that in an action of trover a defendant may show title in a third person. But in the case at bar this principle does not apply, because Jacob Heistand was in the actual possession of the land until the 29th of September, 1830, when he sold and conveyed to the plaintiff, for a valuable consideration, the right, as above described, to enter and take all the iron ore in the ten acres and forty-three perches. The contract was executed by the parties; by the plaintiffs, in pursuance of the grant, entering on the land and expending their money and labor in digging and raising the ore. The defendants, finding the ore dug and at the pit's mouth, entered, took and converted the same to their own use. For this injury the action of trover is an appropriate remedy: 3 Serg. & Rawle, 509; *Brown* v. *Caldwell*, 10 Serg. & Rawle, 114. If, as is alleged, the subsequent grant to Guilford and Wright was a violation of the previous grant to William Bennet, the question may be tried in an action on the case; or, perhaps, William Bennet and those who claim under him have acquired by the contract such an interest in the soil as may enable them to sustain an ejectment for the

recovery of the possession. Under, however, the circumstances of the case, William Bennet, never having been in possession and not having done anything in pursuance of the contract, does not become the owner of the ore when raised, which is a necessary ingredient in the positions of the defendants' counsel, that title in him is sufficient to defeat the action, although the defendants are wrong-doers or trespassers.

But the form of the action is of but little consequence, as we understand it to be the wish of the parties to have the right to the mine settled. It is not the intention of the court to express any opinion on the rights of William Bennet or his heirs, as they are not parties to the special verdict; nor in the view we have taken of the cause is this necessary. We give no opinion on the point of non-user, so much pressed by the counsel for the plaintiffs, but shall take it for granted that Bennet's right was not impaired by time, and that it was a subsisting interest up to the sheriff's sale, and continued so until the commencement of this suit and trial of the cause. The case so far as Grubb's heirs are concerned, was this: On the 6th of March, 1879, David Forree and wife, by their deed of that date, conveyed to William Bennet, an iron master, twenty acres in fee, being part of the tract of land held by the said David Forree, by a devise from his father, John Forree, deceased, as before mentioned. This deed, *inter alia*, recites, that in consideration of 107 pounds, the said David Forree and wife granted, bargained, sold, etc., to William Bennet, his heirs and assigns, all the following described tract of land, beginning, etc., containing twenty acres and the allowance, to have and to hold the aforesaid tract of twenty acres of land and premises granted, mentioned, or intended so to be, with the appurtenances, unto the aforesaid William Bennet, his heirs and assigns, etc. Then follows the covenant or grant now under consideration, and which is particularly set forth in the special verdict, and which contains the consideration for which the grant was made, viz.: six pence a ton for every ton taken from the premises of two hundred and eighty-two acres. This deed was made in pursuance of a previous article of agreement made between these parties.

James Smith, Esq., obtained judgment against William Bennet to the November term, 1770, for 2,000 pounds. Sev-

eral executions were issued, and among others an *alias venditioni exponas*, to the August term, 1771, on which the sheriff returned that he had taken in execution and sold a certain island, etc., to David Grier, for 160 pounds, and also that he sold the ore bank taken in execution, containing twenty acres, with its appurtenances, to George Eichelberger, for the sum of 60 pounds, lawful money, etc.

The *fieri facias*, by virtue of which the sheriff made his levy, is lost. But in the recital of the sheriff's deed to Eichelberger, it is said, among other things in the return, that he seized in execution one ore bank containing about twenty acres, etc. But in the inquisition it was found, as appears by the same recital, that the rents, issues and profits of the island, etc., and the said ore bank, containing about twenty acres, with the appurtenances, were not of a clear yearly value, etc. In the deed, the sheriff grants, bargains, sells and delivers to George Eichelberger, his heirs and assigns, all that, the said ore bank, containing twenty acres, and the usual allowance, be the same more or less (it being the same ore bank which William Bennet purchased from a certain David Forree), together with all and singular the houses, outhouses, edifices and buildings thereon erected and being, and also all and singular the lights, easements and appurtenances to the same ore bank belonging or in anywise appertaining, and the reversions and remainders thereof, and also all the estate, right, title, interest, benefit, claim and demand whatsoever, of him, the said William Bennet, both at law and in equity or otherwise howsoever, of, in, to and out of the same premises and every part thereof, to have and to hold the said ore bank, with its appurtenances, hereditaments and premises hereby granted and released, or mentioned so to be, with their rights, members and appurtenances, unto the said George Eichelberger, his heirs and assigns, etc. By several intermediate conveyances, the title of George Eichelberger, the sheriff's vendee, to the twenty acres and its appurtenances, became vested in Henry B. Grubb, and the defendants claim as his heirs and legal representatives. The defendants contend that Henry B. Grubb, who derives title from William Bennet through the sheriff's vendee, has a right to all the iron ore to be found on the two hundred and eighty-two acres; that Forree's deed

to William Bennet contains a grant to the latter, his heirs and assigns, of the privilege of digging, taking and carrying away all such iron ore, from time to time, and at all times, with the single condition of paying six pence a ton to the grantor, his heirs and assigns; that by virtue of the judgment, executions, sale, sheriff's deed, and the several conveyances referred to in the special verdict, this privilege became vested in Henry B. Grubb, his heirs and assigns; and that consequently, David Forree having conveyed away the right to all the iron ore in the said two hundred and eighty-two acres, Jacob Heistand, Jun., who afterward purchased the eleven acres, part of the two hundred and eighty-two acres, had no authority to grant the same privilege to Guilford and Wright.

It is unnecessary to examine the intermediate conveyances from Eichelberger to Grubb. Grubb has the same right that Eichelberger acquired at the sheriff's sale, and it is obvious that whatever words may be used in these conveyances, they can not enlarge the title vested in the sheriff's vendees. And this makes it requisite to ascertain the extent of this right. It is contended that the privilege of taking ore, as it existed under William Bennet, is passed to Eichelberger by the sheriff, as an easement or appurtenance to the twenty acres. Before examining this question, I must remark, that in case of a variance between the levy and the subsequent proceedings (which may have been the case here, although it does not distinctly appear), the levy must govern. Although the power of the sheriff to dispose of real estate is founded on the levy, he can neither inquire by inquest, nor extend nor sell anything else. But the court do not think proper to rest the cause on this point. I shall proceed to examine the question, whether the privilege or right in controversy is appendant or appurtenant to twenty acres; for if so, it must be admitted that the words in the sheriff's deed are sufficiently comprehensive to pass the interest. About the general principles of this branch of the law there can be no difficulty. To make a thing appendant or appurtenant, it must agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal can not properly be appendant to a thing incorporeal, nor a thing incorporeal to a thing corporeal. But things corporeal which lie in grant, as advow-

sons, commons and the like, may be appended to things corporeal, as a manor, house or land; or things corporeal to things incorporeal, as lands to an office. But yet, as has been said, they must agree in nature and quality: Co. Lit. 121, b. And although lands can not in general be appurtenant to land, yet the parties may, by express words of intention, or by their conduct, as using the one as parcel of the other, make the one appendant or appurtenant to the other.

Thus, although, by the grant of a messuage *cum terris pertinentiis*, land occupied continually with the house passes, though land is not properly appurtenant to a house; yet it has been ruled, that by the grant of land *cum pertinentiis*, another house or land does *not* pass *unless it be found to be parcel:* 4 Com. Dig. Grant, 314; Plowd. 170; 1 Lev. 131; 12 Co. Litt. 5; 1 Com. Dig. 530, tit. Appurtenances; 3 Saund. Rep. 401, note 2; 1 Rob. on Wills, 400; 3 Bac. Abr. tit. Grant, 397; 1 Serg. & Rawle, 169; 5 Serg. & Rawle, 107; 4 Yeates, 146; 7 Mass. Rep. 6; 6 Mass. Rep. 332; 17 Mass. Rep. 443; 3 Rawle, 271; 1 Johns. Ch. 284.

In the case at bar, the right was never exercised by William Bennet, nor was the privilege of raising ore ever enjoyed by him or any other person, as an appurtenance to the twenty acres; it can not therefore, on that ground, be considered as parcel thereof.

Nor can it pass as an incident to the twenty acres, as a thing appendant or appurtenant may sometimes pass, without saying *cum pertinentiis:* Co. Litt. 307; 5 Serg. & Rawle, 107; 3 Rawle, 271; for however convenient it might be to own both, yet the right to the one is by no means necessary to the enjoyment of the other. It is said that it was the object of William Bennet to obtain a monopoly of the iron ore for the supply of a furnace, of which he was the owner, at the mouth of Codorus creek. And if this be so, the object is attained by the ownership of both, and the argument would rather tend to show that the twenty acres and the right in question were appurtenances to the furnace. It is a practice by no means uncommon for the owners of iron works to purchase land in fee simple and wood-leave on lands adjoining. Now, it never has been thought that the privilege in the one case was appurtenant to the right to the other and that a con-

veyance of the one, either with or without the word appurtenances, carried with it the right to the other; although the conveyance of the iron works, when it had been held as parcel, might, under particular circumstances, have that effect. But, although these are the general rules, yet these rules, like all others, are subject to exceptions arising from the clear, manifest intention of the parties; and this makes it necessary to examine the contract of the 19th of September, 1768, and the deed of the 6th of March, 1769, from David Forree to William Bennet. This is the foundation of the defendants' title, and unless it is made an appurtenance by these instruments, the defendants have no title. It appears that at the time this contract was made, William Bennet was the owner of a furnace at the mouth of the Codorus creek. His intention, therefore, was to obtain an adequate supply of iron ore for the use of his works, and this object he attains in the usual way, by the agreement or contract of the 19th of September, 1768. The memorandum of the agreement, after particularly describing the twenty acres, the price agreed to be given for the same, proceeds to say, "and the said David Forree hath *further* agreed to and with the said William Bennet, to give him and his heirs privilege to dig ore on his other land for the payment of six pence for every ton, if he hath occasion." In pursuance of this agreement David Forree made a deed to William Bennet, of the 6th of March, 1769. In this deed he conveys to him, for the consideration of 147 pounds, in fee, a title to twenty acres and its appurtenances, and then follow these words: "and the aforesaid David Forree, for himself, his heirs, executors and administrators, doth covenant, promise, grant and agree to and with the said William Bennet, his heirs and assigns, that he, the said William Bennet, his heirs and assigns, shall and may from time to time and at all times hereafter, dig, take and carry away all iron ore to be found within the bounds of the said David Forree's tract of land, containing two hundred and eighty-two acres, provided the said William Bennet, his heirs and assigns, pay to the said David Forree, his heirs and assigns, the sum of six pence, Pennsylvania currency, per ton, for every ton taken from the premises of two hundred and eighty-two acres aforesaid."

The deed is a consummation of this contract, and it is in some respects more comprehensive than the article. It is a grant of twenty acres of land in fee simple, and also a grant of an incorporeal hereditament, for a distinct and different consideration, in the remaining part of the tract of two hundred and eighty-two acres. The right to raise ore is an incorporeal hereditament granted for a valuable consideration, and is not, as has been contended, a license revocable at the will of the parties. The grantee, his heirs and assigns, have a right to enter, on a payment of the stipulated sum der ton, from time to time, and at all times hereafter. It is an easement, an incumbrance on the land; and, like a mortgage or judgment, the land passes into the hands of an alienee of the grantor, subject to the lien or incumbrance. There is a sufficient consideration for the contract, and I can not agree with the plaintiffs' counsel, that an alienee of the grantor can be in any better situation than the grantor. It is part of his title. But although these positions are conceded to the defendants' counsel, yet I am at a loss to see any clear intention to make the one appurtenant to the other. It would be a strained presumption to infer this intention from the fact that they are included in the same deed, or from the warranty in the deed, which is only necessary, and which, properly construed, only embraces the conveyance in fee simple of the twenty acres; nor can this be gathered from the use of the word appurtenances in connection with the twenty acres, which is but the usual formulary in the conveyance of real estate.

From a mature consideration of the article of agreement and the deed, we are clearly of the opinion that the right and privilege to take iron ore in the two hundred and eighty-two acres was a distinct and independent covenant, having no relation to the conveyance of the twenty acres. It certainly is not expressly said to be appurtenant to the twenty acres. Although there might be, under particular circumstances, something in the argument that it was appurtenant to the furnace, there is no reason for holding that it is appurtenant to the twenty acres. This intention can not by any natural construction be inferred.

Judgment affirmed.

ESMOND ET AL. V. CHEW ET AL.

(15 California, 137. Supreme Court, 1860.)

[1] **Upper and lower claims—Right to deposit tailings.** Plaintiffs owned mining claims below, and defendants above, in the bed of the same stream. Defendants' claims were located first, but plaintiffs' claims were located before the working of the claims above affected those below. Defendants constructed a flume extending down to and upon plaintiffs' claims, which carried a large quantity of tailings down upon the lower claims: *Held*, that defendants had no easement or right to enter upon plaintiffs' land and erect such structure.

Right of way. The fact of the relation of the mining claims to each other on the same stream does not give the upper claimant a right of way of necessity over the lower claims.

Local custom must be averred and proved. If there is any local mining custom giving an upper claim the right to carry a flume and dump tailings upon a lower claim, such custom must be averred and proved.

[2] **Water rights of miners.** Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*.

Appeal from the Fourteenth District.

To the facts stated in the opinion, add that the tailings were deposited by an extension of defendants' flume upon plaintiffs' ground—that is to say, defendants, after crossing their own lower line with their sluice, proceeded, from time to time, as the tailings accumulated at the end of each piece of flume, to add other pieces, so that, at the commencement of this suit, they had encroached with their sluice over eight hundred feet upon plaintiffs' claims. For this distance they had filled up the claims of plaintiffs with tailings to the depth of from twenty-five to thirty feet, and covered up a sluice belonging to plaintiffs, together with a blacksmith shop, tools, etc.

At the time of the location of plaintiffs' claims, and at the date of plaintiffs' purchase, no portion of defendants' sluice had been erected thereon, and no tailings had been deposited.

[1] Compare *Logan* v. *Driscoll*, 19 Cal. 626; *Post* FLOODING; *Lincoln* v. *Rodgers*, 1 Mont. 221; *Post* TAILINGS.

[2] *Hill* v. *King*, 4 M. R. 533.

Defendants had verdict and judgment. Plaintiffs appeal.

McCONNELL & NILES and A. A. SARGENT, for appellants.

HENRY MEREDITH and C. W. HILL, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

The plaintiffs are the owners of certain mining claims situated in the bed or channel of a stream known as Missouri cañon. The defendants own claims in the same stream, above and adjoining those of the plaintiffs. The claims of the defendants were first located. The complaint alleges that the defendants wrongfully constructed a flume upon the claims of the plaintiffs, and deposited thereon a large quantity of tailings from claims above; and that the plaintiffs were greatly injured and damaged thereby. The answer admits the construction of the flume, and the deposit of tailings, but denies that these acts were wrongful, and avers that the flume was constructed by the defendants for the purpose of working their claims; that its construction was proper and necessary for that purpose, and that the deposit of tailings was occasioned by the ordinary working of these claims. There is no dispute as to the facts.

On the trial of the case, the court instructed the jury, among other things, that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet; and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same, and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as the same can be constructed without *considerable* damage to claims subsequently located.

The real question in the case is, whether the defendants, as a matter of strict legal right, are entitled to an easement upon the plaintiffs' claims, for the purposes mentioned in the answer. Upon this question, we readily confess that our convictions are decidedly adverse to the position of the defendants. We do not see upon what legal foundation the right claimed by them can possibly rest. As a proposition

of law, the right of one person for his own advantage to enter upon and use the property of another, without his consent, can not be maintained. The doctrine of necessity, invoked by the defendants, and relied upon by the court below, has no application. Under certain circumstances, a person may have a right of way, by necessity, over the land of another; but the doctrine that one person may have a right, by necessity, to go upon the land of another, and erect thereon buildings or other structures, we are by no means prepared to recognize. The fact that the land is a mining claim can make no difference, for the principle is the same, whatever is the character of the property. If the acts of the defendants were authorized by any local custom or regulation, its existence should have been averred and proved.

Our opinion is, that the acts complained of are without sufficient justification; and that the court erred in its view of the law, as given to the jury. The defendants had unquestionably the right to work their claims, but the same right belonged to the owners of every other claim on the stream. The channel of the stream was the natural and necessary outlet for all, and no one had, as against the others, the right to its exclusive use for that purpose. The recognition of such a right would be in violation of every principle of legal justice. The true rule is, that each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream, and the water flowing therein; and where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case.

Judgment reversed, and cause remanded for a new trial.

BIG MOUNTAIN IMPROVEMENT COMPANY'S APPEAL.

(54 Pennsylvania State, 361. Supreme Court, 1867.)

Surface right restricted to coal breaker and dump. The grant of a surface right with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt," is the grant of an easement only, although described to be in fee.

Easement defined. An easement is "a liberty, privilege or advantage which one may have in the lands of another, without profit."

[1] **Parol contract for exchange of land—Estoppel.** A parol contract for the exchange of land is not complete when it wants certainty, and possession has not been taken under and pursuant to it; but if a party enter upon land in consequence of a parol promise of the owner to exchange for other land, and make improvements with the knowledge of the owner, the latter, although not bound in law for want of writings, yet is in conscience, so far as to preclude him from taking advantage of the want of a contract.

[2] **Injunction against disturbance by estopped owner—Ejectment, not equivalent to equitable relief.** A party by whose encouragement expenditures have been made, to such an extent as to be incapable of re-imbursement except by enjoyment, will be enjoined from disturbing the possession; he is estopped because he would wrong the party by withdrawing his consent. When the complainant has such a right, and the defendant is thus estopped, the defendant may be enjoined from prosecuting an ejectment for the premises; and the fact that complainant would have a defense to the ejectment is no bar to relief in equity, because ejectment would not affirmatively assert the complainant's right short of three verdicts.

Act of June 16, 1836, construed. Under the act of June 16, 1836, the courts are invested with full chancery powers over corporations, and may restrain a corporation from doing an unconscionable thing outside of its ordinary business, as well as within it.

January 20, 1867. Before WOODWARD, C. J., THOMPSON and STRONG, JJ. READ, J., sick. AGNEW, J., at Nisi Prius.

Certificate from Nisi Prius.

This was a bill in equity by Thomas Baumgardner against The Big Mountain Improvement Company and William P. Jenks, president, Charles W. Trotter, William A. Atlee, Thomas Shipley and D. C. Wharton, directors of said company, filed April 14, 1862.

The defendants filed a joint answer August 4th; the com-

[1] *McGarrity* v. *Byington*, 2 M. R. 311.

[2] *Gooch* v. *Sullivan*, 5 M. R. 14.

plainants replied October 4, 1862, and same day the bill, answer and replication were referred to Garrick Mallery, Esq., as examiner and master.

There were numerous matters complained of in the bill, but the appeal limited the inquiry to one question. With reference to that, the bill set out that on the 6th day of December, 1853, the owners of a tract of land in Northumberland county known as the "Robert Gray tract," "agreed to sell and convey in fee simple to the Big Mountain Improvement Company the whole of the surface right of and in all that certain part of the tract, etc., described, etc., containing about ten acres, deed to be executed whenever the said company demand the same and comply with the covenants, etc." * * * "The surface right hereby granted shall not be deemed or taken to be a right granted to the said company for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt;" that afterward the whole of the tract, through sundry mesne conveyances, became vested in the complainant, and that no reservation or exception of the surface right over the beforementioned ten acres is contained in any of the conveyances; that the company erected a breaker with the usual buildings and appurtenances on the easternmost line of the ten acre tract; that difficulties and disputes arose between the complainant and the company with respect to the other parts of the tract, and on the 10th day of February, 1859, both parties agreed to "leave all matters of damages or trespass outside the ten acres," to three arbitrators, whose award was to be final. The bill further set out that at the same time it was agreed verbally between complainant and the president of the company that the complainant should erect a coal-breaker necessary for his operations on the "Gray tract," then contemplated by him, on the north-easternmost portion of the ten acre tract, and that for the purpose of erecting the breaker with the usual appurtenances, etc., the company should surrender to him their right to the surface of 3½ acres of the north-eastern portion of the tract, and that in exchange the company should have the surface right to an equal quantity of the Gray tract; that in pursuance of the agreement the complainant took possession of that portion of the ten acre tract and erected

a large and expensive breaker with the other works belonging to it,. at a cost of above $16,000, and that the defendants took possession of the portion of the tract taken by them in exchange; that the arbitrators, under the agreement, visited and examined the premises with the president and others interested in the company and the complainant, and that the complainant's workmen were then employed in constructing his breaker, etc., on the portion of the tract surrendered to him; that the president then informed the arbitrators of the exchange which had been made and that they were not to take into consideration the occupancy of the respective parts exchanged; and that the arbitrators awarded that the company pay to the complainant $1,000 in full for all damages of every kind; that the defendants soon after drove stakes to mark the lines of the portion taken by them in exchange; that the complainant, on the 9th of February, 1859, entered into an agreement with John J. and William H. Douty for mining coal on the Gray tract; that they were to have the use of the breaker, which it was agreed should be ready for use against the 1st of July, 1859, at which time the lessees commenced mining on the tract; the breaker was to be kept in order by the complainant.

The bill further set out that difficulties again arising between the complainant and defendants, the parties met in Philadelphia about the 20th of December, 1859, for the purpose of adjusting them, and then agreed, amongst other things, that the $1,000 awarded by the arbitrators should be paid and that a conveyance for the surface rights exchanged should at once be drawn and executed; that subsequently the defendants submitted to the complainant the draft of an agreement as containing the matters agreed upon in Philadelphia, including a stipulation to pay the $1,000 and the execution of the deeds of exchange, to which the complainant refused to accede as not containing the stipulations arranged in Philadelphia and as implying in its recital that the breaker had been erected inadvertently and not in pursuance of an agreement; that soon after the 21st of March, 1860, a surveyor, employed by the defendants for the purpose, made a survey of the land, exchanged and marked the respective portions distinctively on the plot, and from this plot the defendants' attorney pre-

pared deeds purporting to convey to the parties their respective portions as indicated on the plot; that there were prepared by the same attorney releases to be executed by certain mortgagees on complainant's land and that the complainant procured the execution of the releases; that afterward the breaker of the defendants was burned, and they built another, more than 1,000 feet distant from it, and that in consequence the land which they were to take in exchange having become valueless they refused to execute the deed of exchange, and on the 6th of July, 1860, brought an action of ejectment against the complainant and his lessees to recover the possession of the land on which his coal-breaker is erected and for which he was to receive a deed of exchange from the company, which ejectment is still pending. The bill prayed that the defendants might be restrained from proceeding in the action of ejectment, as well as for other relief.

The defendants answered that the complainant is not entitled to relief against the ejectment, because he can avail himself of every defense in the court of law which he can set up in a court of equity, and as the court of law has already jurisdiction of the subject-matter, he is not entitled to transfer the case from that court to the Supreme Court. They deny the parol agreement of exchange, and that they gave the complainant permission to erect his breaker on the ten acre tract, or that the complainant took possession in pursuance of such agreement as he has alleged, or that they took possession of any other land in pursuance of such agreement; they admit they visited the premises with the arbitrators, and that the complainant's workmen were then constructing the breaker, but deny that they had surrendered the surface right, or that Jenks informed the arbitrators of any exchange of land and directed them to confine themselves to the damage, if any, of the trespasses in the location of a drift road, etc.; and Jenks, one of the defendants, states that he then remonstrated with the complainant against constructing his breaker on that location, averring that he had no right to construct it; that the complainant averred that he owned the whole ten acres under a conveyance from the owners of the Gray tract. The answer denies that any stakes were driven to indicate any land exchanged; it avers that complainant's breaker was erected after

notice that he was erecting it on defendant's property, and that they knew nothing of his agreement with his lessees; that the agreement which complainant refused to sign was in accordance with the arrangements in Philadelphia; that the complainant was not in a condition in regard to his title to carry out his arrangements; that in consequence of the complainant's refusal to convey the land, the defendants were compelled to select another site for their breaker.

To understand the case on the points considered in the Supreme Court, a statement of the evidence, as reported by the master, is necessary. He reports:

"The first testimony upon this point" (the exchange) "related to the time when the arbitrators met, who were appointed under an agreement dated March 11, 1859, to whom were submitted all matters in variance between the parties. Mr. Bird, the respondent's witness, speaks of this matter, first in order of time; that before they left Shamokin, on the day of the arbitration, the complainant said to Mr. Jenks, or Mr. Trotter, 'That, for what he wanted to take of the ten acres, to put his breaker on, he would give them other land that would suit them better, and he proposed to give something more in quantity than he wanted to take of the ten acre surface right.' Mr. Jenks said to him that, if he could do that, they would be willing to make the exchange, and they agreed then that that should be the understanding; and it was to be left to Mr. Van Gaskin to select; and if Mr. Van Gaskin, as the agent of the company, was of opinion that the land that he could give them would suit them better, or as well, he would agree to make the exchange; and the arbitrators and Mr. Jenks and several others went from the town up to the spot where he was putting up his breaker, and then Mr. Jenks said to the arbitrators, 'the matter of the ten acre surface right you need have nothing to do with; Mr. Baumgardner says he will give us other land that will suit us better, and we have agreed to take it, and it is to be left to Van Gaskin to select; and if he is of opinion that he can give us land that will answer as well, or better, we will make the exchange, and you arbitrators need not have anything to do with the ten acre surface right. We intend to make the exchange. That was after we got up to the place and the arbitrators were

going to make up matters to give their verdict.' He also states that Baumgardner had commenced his breaker previously to that time, and was at work at it at that time.

"Mr. Fisk, one of the arbitrators, testified that when they arrived at a point where the line of the Gray tract crosses the Big Mountain railroad, which point was designated by a notch cut in on one of the cross-ties of the railroad, and also painted upon a post or stump of a bush or tree, Mr. Jenks called our attention to that line, and, as nearly as I can remember, his language was this: 'Now, gentlemen, you have nothing to do with this matter of surface right. That has been arranged. That is not the question before you. Mr. Baumgardner and myself have arranged that, and Mr. Baumgardner, with our superintendent, Mr. Van Gaskin, will go on and stake out the ground, and we are to make an exchange with him. We are to give him the surface right below for his breaker and improvements, and we are to take other ground. But that is all agreed upon. You have nothing to do with that.' He also states that the breaker of Baumgardner was then being built. He saw the excavation, and the men were at work putting in the foundation walls of the present breaker of Mr. Baumgardner. He says he heard no objection to the building the breaker on the other land. A satisfaction was expressed by Mr. Jenks that the matter had been arranged so that Mr. Baumgardner had room for his breaker and improvements, and they had room for their dirt. He confirms the same statement in his cross-examination.

"William A. Cherington, another arbitrator, concurs in the statement made by Mr. Fisk. In his cross-examination, in answer to the question whether it was left open between Mr. Van Gaskin and Baumgardner to select the proper grounds for the purpose of making the exchange afterward, he says, Not as to the matter of selection as to the matter of its staking off. The matter of selection had been agreed upon, as I understood. Mr. Baumgardner and Mr. Van Gaskin were to have it staked off afterwards.

"Mr. Van Gaskin, the agent of the company, says the first he recollects about anything being stated was before we got to the Henry Clay breaker, as we were going up from Shamokin. Mr. Jenks remarked that Mr. Baumgardner was laying his

siding on the embankment of the Big mountain, on their road-bed. Mr. Baumgardner replied, 'the ground is mine; it is all mine.' Then when we got up to where they were at work about the breaker foundation, they were stating to the arbitrators what they would have to take into consideration. And I recollect Mr. Jenks made a remark something of this nature, as near as I can recollect, that the exchange of the ground they had nothing to do with; that Mr. Baumgardner and he had had a talk, and they would fix that matter without giving them any trouble about it. He says that is the substance of the remark to the arbitrators. He thinks it was at the same time that Mr. Baumgardner asked Mr. Jenks where he would have it. He said, 'I don't know. I leave it to my superintendent to be the judge. He knows better what we want.' And it was agreed that I should make choice of the piece of ground in lieu of the piece they were building their breaker and putting their lateral railroad on."

The master reported as to the parol contract of exchange:

"I can not find any parol contract for the exchange of the surface right that will bring the case within the principles laid down in the decisions. * * * The alleged contract did not describe the property to be exchanged, and was too uncertain to be enforced in equity, and possession, the only evidence of part performance, had been taken by both parties before the date of the alleged contract."

He also reported that none of the unexecuted papers, as contended by the complainant, were written contracts.

The complainant contended before the master that the defendants were equitably estopped from interfering with him in the enjoyment of the breaker and the improvements connected with it. On this question he reported:

"I shall not take time to refer to the authorities upon this question, but state that from all the evidence in the case it appears to me to be inequitable that defendants should take from complainant his improvements because there has been a subsequent disagreement between the parties concerning the ground which defendants were to receive in exchange, or an omission by Mr. Van Gaskin to make the selection.

"If the complainant refused to comply with the contract, he would be liable to an action for damages, in which compensation could be recovered by the defendants."

He decided finally:

1. That no parol contract for exchange of the surface right has been proved and so far executed that it can be enforced in equity.

2. That there is no written contract containing a description of the property proved, so as to take the case out of the statute.

* * * * * * * * * *

4. That, under the facts of this case, I find that defendants are estopped in equity from claiming the surface right on which complainant's improvements are erected.

* * * * * * * * * *

10. That the action of ejectment is not the proper remedy in this case, and if it could be maintained, the remedy would not be as effectual as a decree in equity.

11. That an injunction be issued, restraining the defendants from prosecuting the pending ejectment, or from instituting any other action for the recovery of the same premises.

To this report exceptions were filed, which were overruled by Mr. Justice STRONG, and the report confirmed.

And it was further decreed that the defendant, the Big Mountain Improvement Company, and all persons claiming under said company, be perpetually enjoined from further prosecuting the action of ejectment pending in the Court of Common Pleas of Northumberland county, against the defendant and his title, etc.

The defendants appealed.

S. DICKSON, for appellants, cited *Eberly* v. *Groff*, 9 Harris, 251; *Evans* v. *Bicknell*, 6 Ves. 184; Fry on Spef. Per. § 384; *Lestor* v. *Foxcroft*, 1 Lead. Cas. in Eq. 507, note; *Robertson* v. *Robertson*, 9 Watts, 32; *Cole* v. *White*, 1 Br. C. R. 409; *Greenlee* v. *Greenlee*, 10 Harris, 234; *Moore* v. *Small*, 7 Id. 469; *Dabsell* v. *Crawford*, 1 Pars. R. 37; *Aurand* v. *Wilt*, 9 Barr, 54; Roberts on Fr. 135; *Allen's Estate*, 1 W. & S. 383; *Parker* v. *Smith*, 1 Coll. C. C. 618; *Clare Hall* v. *Harding*, 6 Hare, 273; *Duchess of Kingston's Case*, 2 Smith L. C. 661, note; *Crest* v. *Jack*, 3 Watts, 238; *Dann* v. *Spurrier*, 7 Ves. 235; *Kenney* v. *Brown*, 3 Ridgway, 519; 1 Eq. Cas. Ab. 355;

2 Id. 522; 4 S. & R. 244; *Alexander* v. *Kerr*, 2 Rawle, 92; 3 Id. 326; *Larkins' Appeal*, 2 Wright, 459; *Miranville* v. *Silverthorn*, 12 Id. 149; *Glidden* v. *Strupler*, 2 P. F. Smith, 400; Addisonon Cont. 864, 865; *Black* v. *Hepburne*, 2 Yeates, 331; *Caldwell* v. *Fulton*, 7 Casey, 476; *Funk* v. *Haldeman*, 3 P. F. Smith, 229; *Dark* v. *Johnson*, Leg. Int., Vol. 34, No. 21, May 24, 1867; *Jackson* v. *Buel*, 9 Johns. 298; *Millington* v. *Goodtitle*, And. 106; Stephens, N. P., *Ejectment; Smith* v. *Barrett*, 1 Lev. 114; 2 Gale & Davison, 435; *Clap* v. *Draper*, 4 Mass. 266; *Doe* v. *Burt*, 1 T. R. 701; *Loring* v. *Bacon*, 4 Mass. 576; *Stockwell* v. *Hunter*, 11 Metc. 448; *Griffith* v. *Cochran*, 5 Binn. 105; *Marlin* v. *Willink*, 7 S. & R. 298; *Murphy* v. *Hubert*, 4 Harris, 50; *Smith* v. *McIver*, 9 Wheat. 532; *Russell* v. *Clark*, 7 Cranch, 69; *Taylor* v. *Carryl*, 12 Harris, 259; S. C., 20 How. 584; *Crane* v. *Brunnell*, 10 Paige, 335; 1 Story's Eq. I. 72; *Lynch* v. *Sumral*, 1 Marsh. (Ky.) 469; *Pratt* v. *Pond*, 5 Allen, 59; *Merrill* v. *Lane*, 16 Ohio, 373; *Grant* v. *Quick*, 5 Sand.; S. C. 612; *Foot* v. *Sprague*, 12 How. 355; *Winfield* v. *Bacon*, 24 Barb. 120; *Kemp* v. *Pryor*, 7 Vesey, 237; 1 Spence Eq. Jur., Book 4, 684 *et seq.*; *Harrison* v. *Nettleship*, 2 M. & K. 423; *Van Vleck* v. *Clark*, 38 Barb. 316; *Farebrother* v. *Welchman*, 3 Drewry, 122; *Gomperts* v. *Pooley*, 4 Id. 448; 17 & 18 Vict. C. 125, Sec. 83; 22 Stat. at Large, 454 (1854); *Tennig* v. *Higgs*, 1 De G. & J. 388; *Magnaw* v. *Miner R. Co.*, 3 Drewry, 130; *Carron Iron Co.* v. *McClaren*, 25 Eng. L. & Eq. R. 51; 5 H. of L. 416; *Evans* v. *Bembridge*, 8 De Gex M. & G. 100; *Jones* v. *Geddes*, 14 Sim. 606; *Bank* v. *Railroad Co.*, 28 Verm. 470, 477; 2 Seton on Decrees, 877 *et seq.* (ed. 1862); Hilliard on Inj., C. 6, 27; Id. 88; 2 Smith's L. C. 651; *Shaw* v. *Beebe*, 35 Vt. 204; *Rangely* v. *Spring*, 28 Me. 127; *Woods* v. *Wilson*, 1 Wright, 379; *Philhower* v. *Todd*, 3 Stock. (N. J.) 54; 2 Smith's L. C. 757; *Forsyth* v. *Day*, 46 Me. 176; *Adlin* v. *Gove*, 41 N. H. 465; *Gunn* v. *Bates*, 6 Cal. 263; *Lewis* v. *Carstairs*, 6 Whart. 207; 5 W. & S. 205; *Ware* v. *Cowles*, 24 Ala. 446; *Morton* v. *Hodgdon*, 32 Me. 327; *The Cambridge Inst.* v. *Littlefield*, 6 Cush. 210; *Watkins* v. *Peck*, 13 N. H. 360; *Darlington's Appropriation*, 1 Harris, 430, *Carpenter* v. *Stilwell*, 1 Kernan, 61; 2 Smith's L. C. 767.

J. E. GOWEN, for appellee, cited *Carncross* v. *Lorimer*, 2

Jur. N. S. 149; *McKellip* v. *McIlhenny*, 4 Watts, 317; *Strickler* v. *Todd*, 10 S. & R. 74; *Rerick* v. *Kern*, 14 Id. 267; *Robinson* v. *Justice*, 2 Pa. R. 19; *Swartz* v. *Swartz*, 4 Barr, 358; *Hamilton* v. *Hamilton*, Id. 103; *Le Fevre* v. *Le Fevre*, 4 S. & R. 241; *Folk* v. *Beidelman*, 6 Watts, 339; *Marsh* v. *Weckerly*, 1 Harris, 250; 2 Eq. Cas. Abr. 522; *Beaupland* v. *McKeen*, 4 Casey, 130; *Miranville* v. *Silverthorn*, 12 Wright, 147; *Stevens* v. *Stevens*, 11 Metc. (Mass.) 251; *Dyer* v. *Sanford*, 9 Id. 395; Angell on Water Courses, 351; Washburn on Easements, 543; *Queen* v. *Chorley*, 12 Ad. & E. N. S. 515 (64 E. C. L. R. 515); *McKinney* v. *Reader*, 7 Watts, 124; *Wood* v. *Lake*, Sayre's Rep. 3; *Boyce* v. *McCulloch*, 3 W. & S. 429; *Glidden* v. *Strupler*, 2 P. F. Smith, 400; *Somerset Coal Co.* v. *Harcourt*, 2 De G. & J. 596; *Duke of Beaufort* v. *Patrick*, 17 Beav. 60; *Wesley Church* v. *Moore*, 10 Barr, 273; *Painter* v. *Harding*, 2 Phila. R. 59; *McGowin* v. *Remington*, 2 Jones, 63; 1 Story's Eq. Jur. § 70–72.

The opinion of the court was delivered, May 13th, 1867, by THOMPSON, J.

The plaintiff's bill contains a variety of matters in regard to which relief was prayed, but was refused by the master, with a single exception, for good reasons as his report abundantly shows, and affirmed by my brother STRONG on a hearing at Nisi Prius. The subject excepted from this result was a prayer for an injunction to restrain the defendants from prosecuting an action of ejectment brought in Northumberland county for the recovery of the possession of about three acres of land, occupied by the plaintiff as the site of a coal-breaker and connecting improvements.

These works, the plaintiff alleges, were erected on the ground in controversy with the full knowledge, acquiescence and assent of the defendants. The main argument here was upon this point, and as we think the other subjects of the bill were properly disposed of and need no further examination, we will confine what we have to say to this one question exclusively. The facts found by the master show that the appellants on the 6th December, 1853, contracted with the owners

of the "Gray" tract, situate in Coal township, Northumberland county, for the purchase "of ten acres of surface right" of the tract in fee; the extent of which grant is explained in the articles of agreement as follows: "The surface right hereby granted shall not be deemed or taken to be a right granted to said company for the purpose of laying out a town, or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt." This was but the grant of an easement although described to be in fee, which is generally defined to be "a liberty, privilege or advantage which one may have in the lands of another without profit"; Gale & Wheatley on Easements, 6.

Under this grant, accurately defined by a survey, the defendants erected at the southeastern end a coal-breaker in 1854, and continued the occupancy of the land until after their breaker was burned down in 1860, when they erected a new breaker at a different place on a different tract, and since then have occupied the ground but little, if any.

Prior to 1859, the complainant became the purchaser in fee of the "Gray" tract without any reservation in his deed or notice in the title of the previous grant of the surface right in the ten acres to the defendants. This is not, however, of much consequence in the case, as the company's possession was notice of their right. Early in 1859, the complainant entered upon the northeastern end of the ten acres sold to defendants, with a view to the erection of a coal-breaker preparatory to mining from the Gray tract, the fee of which he owned. The circumstances of the entry are not distinctly proved by the master; but the plaintiff's bill alleges it to have been made pursuant to a parol contract for an exchange of lands between the plaintiff and defendants, contemporaneously with an agreement to refer certain matters in variance relative to "damages for trespass outside of the ten acres," dated the 10th of February, 1859.

Although this restriction as to the damages for trespass looks like the admission of the existence of a contract of some kind in regard to the plaintiff's entry, yet the contract of exchange is distinctly denied in the answer, and not found by the master; or rather the master finds against the existence of such a parol contract with such part execution as would take

it out of the operation of the Statute of Frauds and Perjuries. Whatever there was like a contract between the parties, it was defective as a complete parol contract, wanting in certainty as well as of possession taken pursuant and under it. At this time authorities are not needed to prove that these objections are fatal to an alleged parol sale, and not the less so to a parol contract for the exchange of land. Under this state of proof, we think the master could have done no otherwise than to have found against the plaintiff on the allegations in the bill of an executed parol exchange.

This brings us to consider whether, although such a parol contract as avoids the statute was not shown by the plaintiff, yet whether there was not such an agreement between the parties and such promises by the defendants to accept "other land" in exchange for that taken possession of by the plaintiff, together with such encouragement in an expenditure of money and labor by the plaintiff on the faith of such agreement and promises of the defendants as would render it inequitable and a fraud upon him to permit the latter to revoke their promises and disturb his possession? The master finds this point in favor of the plaintiff, and we think upon abundant testimony. As already said, the agreement of reference excluding trespasses on the ten acres looks like an acknowledgment of an agreement that the plaintiff was not considered a trespasser, and he was probably in the possession at that time. But on the 11th of March, when the parties and *arbitrators* met on the ground to view the alleged cause of damages on account of trespasses committed by the parties on each other, and to determine all "cause and causes of action both in law or equity or otherwise" between them, they were distinctly informed by the president of the company, in presence of the plaintiff, and assented to by the latter, that the arbitrators were to have nothing to do with the matter of their surface right; that that matter had been arranged and was not before them; that Mr. Baumgardner and himself had arranged it; that the superintendent, Mr. Van Gaskins, was to stake out the ground which Baumgardner was to give the company in exchange for that occupied by him on the ten acres. "We are to give him," said Jenks, the president, according to the testimony, "the surface right for his breaker and improve-

ments, and we are to take other ground. But this is agreed upon, and you have nothing to do with it."

The arbitrators acted and made their award without taking into consideration the alleged trespass of the plaintiff, and he went on without let or hindrance, or notice of objection by the defendants, and completed his breaker in the July following, at a cost of from $14,000 to $16,000. This conversation took place within a very short time after the plaintiff had entered into the possession, and nearly the whole expenditure was made subsequently. Although this conversation or agreement was not binding at law, for want of writings, yet it is in conscience, so far as to preclude the defendants from taking advantage of the want of a contract that would bind them to convey the land. They could only avoid its effect in equity by evidence of bad faith on the part of the plaintiff. That does not appear against him. On the contrary, he ran out an equivalent in extent to the land occupied by him on another part of the tract for the defendants, which they refused; and afterward he assented to the staking out by superintendent Van Gaskin of land selected by him after the works were completed. It will be remembered that he was the party to do this on part of the company at the arrangement disclosed before the arbitrators. It was not until the breaker was erected, and all the expense incurred, and disputes had again arisen between the parties about other matters, that an intention was manifested by the defendants to reclaim the land on which the plaintiff's coal-breaker had been erected by bringing their ejectment for it. It was too late then to hope to succeed in that undertaking.

On a kindred point, GIBSON, C. J., in *Swartz* v. *Swartz*, 4 Barr, 358, said: "The principle of the case is, that the revocation would be a fraud, and to prevent that, a chancellor will turn the owner of the soil into a trustee *ex maleficio*." So in *McKellip* v. *McCheney*, 4 Wright, 317, after referring to the doctrine of an equitable defense, in *Todd* v. *Strickler*, 10 S. & R. 74, KENNEDY, J., said: "In *Rerick* v. *Kern*, 14 S. & R. 267, it was held that a parol license given, without consideration, to use the water of a stream for a saw-mill, in consequence of which the grantee went to the expense of erecting a mill, could not be revoked by the grantor at pleasure." * * *

These cases are likewise a sufficient answer to the objection, that the privilege claimed to have been granted here was either an incorporeal right, and if so, ought to have been granted by deed, or if not, it was an interest in land, and ought therefore to have been granted at least by a writing, signed. They also show that whenever a party has induced another to repose upon the faith of his promise, though verbal, to expend his money or labor, for which he can only be remunerated by the enjoyment of the thing so promised, equity will compel the promisor to give such a deed or writing as shall be requisite to secure the promisee.

Without stopping to inquire whether a decree for a conveyance under the circumstances presented by the case before the learned judge is the usual remedy or not, there are numerous authorities, and those cited by the counsel for the appellee are full to the point, that a party by whose encouragement expenditures have been made to such an extent as are not capable of re-imbursement except by enjoyment, will be enjoined from disturbing the possession. Equity estops him because he would wrong the other party by withdrawing his consent: *Trexel* v. *Lehigh Iron Co.*, 6 Wright, 513. There is no higher morality than is contained in the equitable principle that where between two innocent parties a loss occurs, it is to be borne by him whose act occasioned it. The morality of the rule which throws the loss upon him who occasions it, is certainly much less questionable where it results from bad faith or fraud. The result is the same, the protection of the innocent being the object of the rule in both cases. We agree with the court below and the master, that the defendants should be estopped, under the circumstances disclosed and found by the master, from proceeding in the action of ejectment against the plaintiff.

It is objected to this, however, that in the action of ejectment this equitable principle can be administered, and therefore the plaintiff has an adequate remedy at law. To this we can not agree. The writ of ejectment is the process of the plaintiff. The defendant can not use it to settle his equity in the premises. He must wait until it pleases the plaintiff to proceed, and when he does, he may withdraw his suit at will, and renew the contest again and again, until three verdicts or

the Statute of Limitations puts an end to the controversy. At no stage is a definite result achieved so as to put an end to the controversy until the game of three verdicts is played out. While, therefore, ejectment subserves an important purpose in the administration of equitable principles, it is not to a defendant an adequate remedy in its administration, for the reasons given. If he have a good equitable defense, why shall not a defendant have it so administered as to be available and save him from repeated attack? It is better for all parties that litigation be avoided—*inter esse respublica ut sit finis litium.* Under the act of 16th June, 1836, the courts are invested with full chancery powers over corporations: see *Commonwealth* v. *The Bank of Pennsylvania*, 3 W. & S., and can supervise and control them through the equity powers conferred by the act as fully as a chancellor of England could do in the exercise of his functions. May we not, therefore, stay the hand of a corporation from doing an unreasonable thing outside of its ordinary business sphere as well as within it? No limitation of this nature is found in the act. The plaintiff brought his bill against the defendants for an account and sundry other things, among them the matter in hand. There was no doubt of the court's jurisdiction as to most of them, and it is not a reason for dismissing the bill that but one matter remains for a decree. There was no demurrer or special defense as to that, and the parties having submitted to the jurisdiction and answered fully, and exhibited their proofs, the case is undoubtedly in a position to be disposed of according to equity.

This is not added to raise a doubt of our right to enjoin the defendants from proceeding in their ejectment suit, but *quacunque via data*, we are authorized to decree conformably to equity as between the parties. We are for sustaining the decree at Nisi Prius, and it is accordingly affirmed. The costs of this appeal to be paid by the appellant.

Affirmed.

CARNAHAN v. BROWN.

(60 Pennsylvania State, 23. Supreme Court, 1868.)

[1] **License by devise.** A testator gave to three sons a tract of land to be divided among them in portions designated by the will, adding: "further I devise, etc., to my said sons each an equal privilege forever of the coal bank now opened and the ground on the ridge adjacent, so far as may be necessary for digging and taking coal." It seems that the privilege extended to every part of the tract containing coal which might be mined through the opening.

[2] **Ejectment will not lie for an easement.** The devise as to the coal was a mere privilege and easement, an incorporeal hereditament, and ejectment is not the remedy for an interruption of the right.

Error to the Court of Common Pleas of Allegheny County.

This was an action of ejectment brought by Alexander Carnahan against John Brown for the undivided two thirds of 80 acres of coal under a tract of land in Union township, Allegheny county.

The land was originally the property of David Carnahan, who died about January, 1825, having made his will, dated December 28, 1824, by which he devised as follows:

"Sixthly, my real estate, consisting of 200 acres, more or less, situate in St. Clair township aforesaid, I give, etc., to my three sons, William, Alexander and Joseph, and their heirs and assigns forever, to be divided among them as follows, viz.: to William 80 acres adjoining the manor line and Chess line; to Alexander 80 acres next adjoining the above, including the *mantion*-house, barn, etc.; and to Joseph the remaining 40 acres, next to Henry's line; the division line to run from Plummer's line to Carter's line, but to be so run that each shall have a quantity of woodland in proportion to the number of acres devised to him; and further I devise and give to my said sons each an equal privilege forever of the coal-bank now *opined* and the ground on the ridge *adjacant*, so far as may be necessary for digging and taking coal."

Shortly after the testator's death his sons, the devisees, made a parol partition of the lands devised to them, in accordance with the will. On the 18th of June, 1831, Alex-

[1] *Grubb* v. *Guilford*, 5 M. R. 163.

[2] *Union Co.* v. *Bliven Co.*, 3 M. R. 107.

ander conveyed to William six acres of his allotment adjoining William's allotment. William died in 1832, having devised his allotment and the six acres obtained from Alexander to his children. Brown, the defendant, derived his title from these devisees through divers conveyances.

Joseph Carnahan, on the 27th of August, 1862, conveyed his allotment to Alexander, the plaintiff. On the 9th of July, 1860, the plaintiff conveyed to James Woods "all the bituminous or stone coal lying and being under" his allotment and Joseph's which had been conveyed to him as above stated. At the trial the plaintiff withdrew his claim as to one third of the coal, which he had claimed as alienee of Joseph. This claim, therefore, was for one third of the coal under the portion that had belonged to William upon the theory that by the provision of the will in relation to the coal a corporeal interest to the extent of one third had been devised to each of the sons under *all* the land.

The "coal bank" referred to in the will was on the part of the land allotted to Alexander, the plaintiff. The defendant submitted a number of points amongst which were the following:

"1. That the plaintiff has failed to show title to the coal for which he brings this action.

"2. That inasmuch as the undisputed testimony shows that the coal bank mentioned in the will of David Carnahan, was and is opened on the plaintiff's purpart or share of the land, the plaintiff has no interest in the coal which is the subject-matter of this suit."

The court, STOWE, J., refused the points and directed the jury to find a verdict for the plaintiff for "an undivided one third interest in the coal described in the writ," subject to the opinion of the court on the questions in the points which were reserved. The jury accordingly found for the plaintiff "for the one third of the coal," subject to the opinion of the court on the questions reserved.

The court afterward entered judgment for the defendant on the points reserved, *non obstante veredicto*.

The plaintiff took a writ of error, and assigned for error the entering judgment for the defendant.

N. P. & C. S. FETTERMAN, for plaintiff in error.

The ownership of the minerals may be in one person, whilst that of the surface is in another: *Caldwell* v. *Fulton*, 7 Casey, 484. A will must be construed according to the intention of testator: *McKeehan* v. *Wilson*, 3 P. F. Smith, 74; and according to the state of things at his death: *Fox* v. *Phelps*, 17 Wend. 393; and by a comparison of the various devises: *Cook* v. *Holmes*, 11 Mass. 528; *Morrison* v. *Semple*, 6 Binn. 94. A grant of a thing by general description carries the land occupied by it: 2 Wash. Real Prop. 664, 2d. ed.; *Wooley* v. *Inhabitants of Groton*, 2 Cush. 305; *Johnson* v. *Rayner*, 6 Gray, 107; Co. Litt. 4 b.; Cro. Eliz. 522; *Clap* v. *Draper*, 4 Mass. 266; *Fish* v. *Sawyer*, 11 Conn. 545. When the intent is to give the entire usufruct and power of disposal, the legal title will pass: *Lord Mountjoy's Case*, 4 Leon. 147; Co. Litt. 104 b; *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Casey, 241; *Clement* v. *Youngman*, 4 Wright, 341; *Gloniger* v. *Franklin Coal Co.*, 5 P. F. Smith, 9; *Huff* v. *McCauley*, 3 Id. 207; *Doe* v. *Woods*, 2 B. & Ald. 719; *Grubb* v. *Bayard*, 2 Wall, Jr. 81; *Dark* v. *Johnston*, 5 P. F. Smith, 164.

M. W. ACHESON and J. P. BROWN, for defendant in error.

The construction contended for is forced and defeats the intention: *Frederick* v. *Gray*, 10 S. & R. 187; *Fleming* v. *Kerr*, 10 Watts, 444. The devise was a mere license: 2 Bl. Com. 34; Washburn on Easements, 14,596; *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Casey, 241; *Clement* v. *Youngman*, 4 Wright, 341; *Gloniger* v. *The Franklin Coal Co.*, 5 P. F. Smith, 9.

The opinion of the court was delivered, January 11, 1869, by THOMPSON, C. J.

In the view we take of this case there is but a single question in it, and that relates to the nature and extent of the interest which the plaintiff acquired in the land of his brother William, under the will of his father.

We state the question thus, because it is in relation to that portion of the estate of David Carnahan, that this controversy exists. I am strongly inclined to the opinion that the priv-

ilege extended to every part of the tract containing coal, which might be mined through the opening or entrance designated in the will as the coal-bank. This, however, is not material now.

On the part of the plaintiff it was contended, so far at least as William's share of the land was concerned, that the testator, by his will, severed the coal from the surface lands, and made two distinct estates out of it; that is to say, gave a several interest to William in the surface land, and an undivided interest in common with his brothers in the coal in place, under it.

That he did not so mean to treat William's interest, is not reconcilable with the condition of things at the time. The opening or coal-bank was on the plaintiff's share, and it is just as likely that what he intended in regard to the one, so far as the coal was concerned, he intended as to the others. But Alexander never admitted that his surface land was separated from the coal in it, for he sold to William some six or nine acres without restriction.

On the other hand, the defendant contends that the will was a devise of a mere privilege and easement, an incorporeal hereditament, a right in, or issuing out of, the land, and that ejectment is not a remedy for a deprivation or interruption of such a right or privilege. That this is so there is no question, and we need only cite *Johnstown Iron Co.* v. *The Cambria Iron Co.*, 8 Casey, 241, *Clement* v. *Youngman*, 4 Wright, 341, *Gloniger* v. *The Franklin Coal Co.*, 5 P. F. Smith, 9, and *Grove* v. *Hodges*, Id. 504, to prove it.

The words of the will immediately bearing on the question, after devises amongst his sons in severalty by description, are, "And further, I devise and give to my said sons each an equal privilege (not share) forever of the coal-bank now opened, and the ground on the ridge adjacent, so far as may be necessary for digging and taking coal."

This was obviously but a grant or devise of a privilege in the coal-bank—not a share or portion of the coal, and an easement in the adjacent land necessary to its enjoyment. We do not consider it necessary in this opinion to give or refer to the many instances in the books, where like conclusions have followed devises and grants similar to the devise just quoted. This has been done in the cases

of *The Johnstown Iron Co.* v. *The Cambria Iron Co.* and in *Clement et al.* v. *Masser et al.*, *supra*. They fully sustain the conclusion we have arrived at, that nothing but a privilege was conferred by the devise in question; and it follows that ejectment will not lie for its interruption.

It is plain that the testator meant that each of his sons might take coal from the opened mine for his own use or otherwise, without the expense of making any new opening on his own land. Perhaps, too, he may not have known that there was coal to be found almost everywhere over the tract, as it turned out, and thus was desirous that each son should have the convenience of free fuel to be procured at that place, rather than to procure it elsewhere by purchase. Neither the words nor intent deducible from the consideration of the whole or any part of the will, lead to any other than this as the proper conclusion as to what was meant by this clause of the will, and this conclusively determines the case against the plaintiff.

The question of estoppel is out of the controversy in this view of it, so far as the action of ejectment is concerned at least. Whether there be or be not grounds for it, it is not necessary to consider, for ejectment as a remedy fails, and we will not discuss that point.

For the reasons given the judgment is affirmed.

1. Ditches constructed prior to the U. S. mining act of 1866 upon the public domain, are easements thereon: *Broder* v. *Natoma Co.*, 5 M. R. 32.

2. An action by mill-owner against mine-owner for filling dam with tailings from ore banks is an action respecting an easement—the mill privilege being an easement: *Crittenton* v. *Alger*, 11 Metc. 281.

3. An easement in running water can not arise by prescription against the proprietor of springs lying above, because he could not complain of the use of the water by the underlying owner during any period of time: *Hanson* v. *McCue*, 42 Cal. 303.

4. Rights in springs and underground currents of water: Id.; *Acton* v. *Blundell*, 12 M. & W. 324; *Post* WATER.

5. Servitude of lower land to drain off surface water: *Ogburn* v. *Connor*, 46 Cal. 347; *Gormley* v. *Sanford*, 52 Ill. 158.

6. As to when easement may or may not be created by parol, see *Yunker* v. *Nichols*, 1 Colo. 551; *Post* IRRIGATION; *Huff* v. *McCauley*, 53 Pa. St. 206; *Post* LICENSE; *Fabian* v. *Collins*, 5 M. R. 20.

7. All materials (stone, etc.) found on land over which an easement is exercised belong to the owner of the fee; *Higgins* v. *Reynolds*, 31 N. Y. 151.

8. The owner of an upper placer claim has no easement to deposit tailings on the claim below: *Lincoln* v. *Rodgers*, 1 Mont. 217; *Post* TAILINGS.

[1]COMYN v. KYNETO.

(Croke, Jacobus, 150. King's Bench, 2 James I.)

AN EJECTMENT WILL LIE FOR A COAL MINE.

Error of a judgment in Durham, in an ejectment of a coal mine in the parish of Cheftin in the street. The defendant pleaded not guilty, and it was found against him and judgment given for the plaintiff.

The first error assigned was: that an ejectment lies not of a coal mine, because it is *quoddam prosicuum subtus solum*, and an *habere facias possessionem* can not be thereof.

Sed non allocatur; for it is a profit well known and whereof the law takes *bon conusance* and therefore an ejectment well lies thereof. And TANFIELD said it was adjudged in this court, in the case of *Mr. Wyld*, that an ejectment lies of a boyllary of salt, and it was cited to be likewise here adjudged betwixt *Lawson and Williams* that this action well lies for a coal mine.

WHITTINGHAM v. ANDREWS.

(4 Modern, 143. King's Bench, 1692.)

Pleading—Description. A declaration in ejectment for mines (*de mineris carbonum*) is good without showing the number of mines, such description being well understood in the venue where laid.

Error of a judgment in ejectment in the county palatine of Durham; the declaration was *de mineris carbonum* in Gateside.

[1] This case is also reported by Noy (p. 121,) under the style of *Comyn* v. *Wheatly*, in these words (being the entire report): "Upon Errour it was resolved that an *Ejectione firm.* lies of a cole mine. 43 E. 3, 35. An assize lies and was brought for a cole mine." Of Noy it was said, in the preface to his volume of Reports "he was a person that hated anything of prolixness; he was a man that writ *multum in parvo* * * all languages in 24 letters."

It was objected that this was very uncertain, for the plaintiff should have named how many mines, because in that county several men have many mines in one place.

This is as uncertain as an ejectment of three acres of meadow and pasture, not showing how much of either. So an ejectment of a messuage and ten acres of land, twenty of pasture and twenty of meadow, *per nomen* of a messuage and ten acres of meadow, more or less. Now, the words more or less could never be intended to extend to forty acres more, there being only ten acres demised, and for this uncertainty a judgment was reversed.

It will not lie of a close, but it must be of a certain number of acres, and the number of the acres must be particularly set forth; and this was *Savill's case.*

E. contra. No greater certainty is required than that the sheriff might know of what to deliver possession, which is done here, for the words *de mineris carbonum* ascertain the nature of the thing in demand.

'Tis true an ejectment *de omnibus*, etc., *omnimodis decimis* is not good, because of the uncertainty of what nature the tithes are; but if the word *fœni* or *lanæ* is added, 'tis well enough, because the nature of it is then made certain.

This action is in the nature of trespass, because of the damages which are to be recovered; and one may bring an action of trespass for a piece of land without any other certainty.

It can not be denied, but that many judgments have been reversed for the uncertainty of the demand; but this case was not so uncertain that execution could not be had of the judgment.

The exception is, that 'tis *de mineris carbonum;* if it had been *de minera* that is admitted to be certain enough.

Now the nature of things will admit of no other certainty, for a mine of coals runs through many lands; and though 'tis but one mine, yet when 'tis opened they usually make several shafts to let in the air; and if the plaintiff had declared but for one mine, he could have recovered but one shaft.

'Tis usage must support this ejectment. If 'tis brought of fifty acres in Ireland, though such a declaration would be uncertain here, yet this court would not reverse a judgment given there without writing thither to know the usage; and of this opinion was the court—that it may be good by custom of the country; and therefore the judgment was affirmed.

GOODRIGHT v. SWYMMER ET AL.

(1 Kenyon, 385. Court of Exchequer, 1756.)

Title necessary to maintain ejectment. Possession for many years of a lead mine under a deed declaratory of a beneficial interest, in which a covenant to convey the legal estate is inserted, will not raise a presumption that such estate has been conveyed to the possessors, nor entitle them to bring an ejectment, which can only be supported by the legal title.

This was a trial at bar, on an ejectment brought to recover a lead mine, of great value, in Wales; and the question intended to be tried, was, whether the place was a part of the lessor of the plaintiffs' manor, or of the defendant.

The plaintiffs' counsel, to prove their title to the manor, of which they contended the place in question was a part, produced a grant of it from the crown, and a conveyance from the grantees of the crown to Gamull and Bevan, with a declaration of trust from those persons, declaring that the conveyance to them was in trust for Sir Richard Grosvenor's ancestor, in which declaration they also covenanted to convey the legal estate to him. This deed was above a hundred and twenty years old, and upon this and a continued possession of the manor by the Grosvenor family ever since, they insisted a title was proved.

Mr. Sergeant Prime, Mr. Norton, and others, for the defendants, objected, that this made no title to the plaintiff, as the legal estate was still outstanding in the heir of the surviving trustee, and the possession of the *cestui que trusts* was the possession of the trustee, to whom the Grosvenors were, at law, to be considered as tenants at will.

Sir Richard Lloyd, Mr. Starkie, Mr. Perrott, and others, *contra*, would have had the covenant considered as a covenant to stand seized, and raise a use to be executed by the statute; or, which they labored more, that the court, (there being a covenant to convey so long ago, and possession having gone according to that covenant,) would presume a conveyance, at this distance of time, especially as leases had been granted from time to time by the Grosvenor family, as absolute

owners of this manor, without the concurrence of the trustees, and they had always been looked upon as such. That twenty years possession would alone be a bar to a title in ejectment, and here had been a possession in the lessor of the plaintiff, etc., for one hundred and twenty years; from which the court would infer a conveyance of the legal estate, and that it was, some way or another, vested in the lessor of the plaintiff; or, at least, here were circumstances enough to be left to the jury, for their consideration, whether they did not amount to sufficient evidence to satisfy them that there had been such a deed.

Mr. Nares compared it to the case of a feoffment without livery, where, if possession had gone along with it, the court would presume livery of seizin, though it did not appear, in favor of the possessor.

PER CURIAM.

The objection is fatal, and if insisted on (though it were to be wished, as the parties have been at so much expense to bring up this matter to be tried, it were fairly entered into and determined on the merits), it will defeat this ejectment; for by the deed the plaintiff has produced, the legal estate appears to be in a third person, and nothing but a legal estate can be recovered by ejectment. Twenty years possession, it is true, if nothing more had appeared, would have been a sufficient title; but then it must be a possession of a legal estate, under a supposed right to it. The possession here has been equitable only under an equitable right; the possession, legally, has been all along in the trustees, in whom the legal estate remains, and to whom the *cestui que trust* is no more than a tenant at will; and, apparent as it is, that the beneficial interest belongs to Sir Richard Grosvenor, the heir of the trustee may yet maintain an ejectment, and take the possession from him. If the possession had been enjoyed pursuant to the conveyance covenanted to be made so long ago, and the possessor could have derived no right but under that conveyance, there would have been some reason for presuming such a conveyance had been made and lost; but here the possession is otherwise accounted for without such a presumption; it having

gone on and continued in the same channel it would have done without such a conveyance; *i. e.*, in the *cestui que trust* and the persons entitled, independent of such a conveyance, to the beneficial interest, which distinguishes it from the case of possession under a feoffment whereon no livery is indorsed; for there the feoffee, independent of the feoffment, has no sort of right or claim; his possession must be under that feoffment therefore, and his claim, a claim of a legal estate; in the enjoyment of which, if he has continued long unmolested, the court will presume that all circumstances requisite to the validity of the instrument under which he holds, were observed, though, on account of the distance of time, it can not be proved. The leases granted were equitable leases, and good in equity only, and the objection can not be got over.

Upon this (though it was greatly labored by the plaintiff's counsel, Sir R. LLOYD, STARKIE, PERROTT, MORTON, ASTON, NARES, and others, and the parties had been at a very great expense in bringing a large number of witnesses from Wales, and a special jury from Shropshire), the defendants' counsel refused to waive the objection, and the cause went off on a nonsuit.

JACKSON EX DEM. GEE V. OLITZ.

(8 Wendell, 440. Supreme Court New York, 1832.)

[1] **Adverse possession—Quarrying stone.** Quarrying stone from time to time during a period of twenty-five years on an uninclosed tract of fifty acres of wild land, with claim of title by deed during that time, *held*, a sufficient adverse possession to maintain a recovery in ejectment against one who, holding the true title, enters upon the premises.

[2] **Adverse possession with and without color of title.** To constitute an adverse possession where there is no paper title, there must be a *pedis possessio*—an actual occupancy—a substantial inclosure; but an actual occupancy of part only will constitute an adverse possession of a whole lot if color of title is shown to the lot.

[1] *Moore* v. *Thompson*, 1 M. R. 221.

[2] *Harris* v. *Equator Co.*, 3 McCr. 14; *Post* POSSESSION; *English* v. *Johnson*, 17 Cal. 108; *Post* POSSESSION. Actual and constructive possession of mines, distinguished: *Armstrong* v. *Lozier*, 6 Colo. 581.

This was an action of ejectment, tried at the Courtland Circuit, in January, 1830, before the Hon. SAMUEL NELSON, then one of the circuit judges.

The suit was brought for the recovery of the possession of the survey fifty acres in lot No. 21, Virgil. Letters patent for the entire lot to J. Gee, one of the lessors of the plaintiff, were produced, bearing date 8th July, 1790. The patentee entered into possession in 1796, claiming to own the whole lot, and continued in the possession of the same down to the time of trial; he sold parts of the lot, but reserved the premises in question, together with some other lands as a wood lot, and refused on that account to sell a part of the premises, of which he always claimed to be the owner, alleging that he paid the fees for surveying the lot when he first went into possession. There was a stone quarry on the premises in question, from which stone had been taken by the patentee for building, twenty-five years before the trial, and at various times since. The defendant claimed under a deed from the surveyor-general to R. Dill, bearing date 21st July, 1792, by which the fifty acres in question were conveyed for the non-payment of the expenses of surveying the lot. R. Dill conveyed his interest to J. Dill in 1811, and in 1827 the defendant went into possession under the title of J. Dill, and immediately thereafter this suit was brought. The lessors were the patentee and D. Gee, to whom the patentee conveyed the premises in 1820. A verdict was taken for the plaintiff, subject to the opinion of this court whether the plaintiff had shown such an adverse possession of the premises in question as to entitle him to recover against the defendant, who held under a title which had been declared by this court valid, on a motion to set aside a former verdict. See 2 Wendell 537.

J. A. SPENCER, for plaintiff.

J. A. COLLIER, for defendant.

By the Court: SAVAGE, Ch. J.

On the question reserved there can not be much doubt. John Gee took possession of the whole lot, claiming it as his own, under a patent from the State for the whole lot. To constitute an adverse possession, there must, in all cases, be a

claim of title; a deed need not be shown as evidence of that title; but where there is no paper title there must be a *pedis possessio*—an actual occupancy, a substantial inclosure. Where a party claims to hold adversely a whole lot, by proving actual occupancy of a part only, his claim must be under a deed or paper title. Color of title under a deed, and occupancy of part, is sufficient proof as to a single lot, to the extent of the bounds of such lot; unless, indeed, the paper title include a large patent or tract, much more than can be necessary for the purposes of cultivation: 1 Cowen, 276, 609. In this case we may be supposed to know that a lot in the military tract contains 600 acres. How much the lessor had sold does not appear, nor how much he reserved for cultivation; but it does appear that the premises in question had been appropriated as a wood lot, and were expressly claimed by the lessor as belonging to him. This was, under the circumstances of this case, all the possession which was required to constitute an adverse possession. If the possession was adverse, and had been so for more than twenty years, as it had in this case, then that possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty shares is in reality not in him.

The plaintiff's possession being adverse in 1811, when Robert Dill conveyed to John Dill, that conveyance is inoperative and void.

On both grounds, therefore, the plaintiff is entitled to judgment.

WARING v. CROW.

(11 California, 366. Supreme Court, 1858.)

[1] **Parties.** In ejectment for an undivided fourth of a mining claim, it is unnecessary to make the owners of the other three fourths parties defendant; the only necessary party defendant is the one who does the plaintiff wrong.

Abandonment. For approved instructions upon the subject of abandonment, see statement of the case.

Title of vendee. A purchaser of a mining claim only acquires such right or title from his vendor as he had at the time of such purchase.

[1] **Abandonment or forfeiture by tenant in common.** The possession of one

[1] *Colman* v. *Clements*, 5 M. R. 247.

tenant in common is the possession of all. The mere fact that one goes away leaving the others in possession creates no presumption of abandonment; nor does his refusal to pay assessments of itself create a forfeiture. In order to enforce the forfeiture of his interest some appropriate suit must be undertaken to liquidate the demand and sell his interest, or there must be clear and unequivocal proof of abandonment.

[1] **Sale by stranger—Silence of co-tenant.** The mere passive acquiescence by a tenant in common in the sale of his co-tenant's interest by a party having no title can not confer any title upon the vendee.

[2] **Custom at variance with general law.** The rights of a party to a mining claim which are fixed by the general law of the land can not be divested by any mere neighborhood custom or regulation.

Appeal from the District Court of the Ninth Judicial District, County of Shasta.

This was an action of ejectment to recover possession of one undivided fourth interest in four mining claims, and also one undivided forty-eighth part of a flume for conducting water to said claims.

The complaint alleges that the plaintiff, on the first day of June, 1857, was the owner and in possession of, and ever since has been and still is, the owner of the following described premises situated in said county of Shasta, to wit: one undivided fourth part of four mining claims situated on Lone Hill, etc., also the one undivided forty-eighth part of a certain flume conducting water from the Clear Creek Ditch to said Lone Hill, for the purpose of working the mining claims on said hill, etc.; which said one fourth interest in said four mining claims, and one forty-eighth interest in said flume, was and is of the value of eight hundred dollars. That said defendant, on the first day of July, 1857, "forcibly and unlawfully entered upon, took possession of, and ousted the said plaintiff from the said premises, and that defendant unlawfully withholds the possession of the said above described premises from said plaintiff, who ever since has been, and still is, entitled to the possession thereof; and the rents and profits of said premises have been and are of the value of one hundred dollars per month." The complaint further charges that said defendant now is, and has been for many months past, extracting the gold from said claims, and converting the same

[1] *Fabian* v. *Collins*, 5 M. R. 20.

[2] *King* v. *Edwards*, 4 M. R. 480.

to his own use, and that he threatens to continue so to do. It also charges that defendant is insolvent, and prays an injunction, and that a receiver may be appointed, judgment for restitution and for damages. The complaint was sworn to. The court below issued the injunction and appointed a receiver upon the facts set forth in the complaint.

The defendant demurred to this complaint, and assigned three grounds of demurrer:

1. There is a defect of parties defendants in said action in this, that the owners of the other three fourths of the claims mentioned in said complaint are not named as co-defendants, and that their interests are wholly unrepresented, etc.

2. Several causes of action have been improperly united in this, to wit: 1st. For the possession of the claims. 2d. For the rents and profits arising therefrom. 3d. For damages.

3. The complaint does not state facts sufficient to constitute a cause of action, in this, to wit: as to who the other parties are holding and owning the other three fourths; that defendant is in possession of only one fourth interest in the claims.

Complaint does not show that defendant is not entitled to some portions of the claims, or that he is not in possession in common with others. Nor does it state that plaintiff is entitled to the possession by virtue of any title or prior possession, or that plaintiff has complied with the laws, rules and regulations of the mining district in which said claims are situated, or that he holds said claims by virtue of said laws, rules and regulations.

At the time of filing the demurrer the defendant filed his answer, setting up title in himself and others to said claim, and also raised the same points in his answer as those raised by the demurrer.

The demurrer was overruled, and the cause tried by a jury.

The court instructed the jury in substance as follows:

1. Prior possession of a mining claim gives prior right to the prior possession, of which the party can not be divested, except by his own act, or by abandonment or the lapse of time, or by the superior landlord or owner of the soil.

2. An abandonment may be proved by the acts of the parties, or by their declaration coupled with acts. If the jury

believe from the evidence plaintiff was first in possession of the claims, and abandoned them, and while the premises were thus abandoned the defendant, or those under whom he claims, took possession, the defendant must recover; but if the jury believe from the evidence that after plaintiff did abandon them he again returned and took possession, and was in possession by himself or agent at the time the defendant entered, then defendant is a wrong-doer, and plaintiff is entitled to recover.

3. Where an abandonment is sought to be established by the act of the party, the intention alone governs. If a party leave a claim with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years, provided there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon.

4. Where a party has once acquired a right by possession to a mining claim, no mining law can divest him of that right unless he assisted in the passage of such law; in which case he would be considered a party to the contract.

Mining laws may be given in evidence to prove a custom in respect to size of claim, or to raise a presumption of abandonment, where such laws have a universal notoriety throughout such district; or if they have not, then proof must be given that the party sought to be bound had actual notice of them.

5. The possession of one tenant in common is the possession of all.

6. A purchaser of a mining claim only acquires such right or title from his vendor as he had at the time of such purchase.

7. The power to occupy for another gives no right to such agent to sell; but there must be a special agency for such purpose.

8. One who might by inquiry ascertain what rights his vendor has, and neglects to make such inquiry, is not an innocent purchaser.

Plaintiff had verdict and judgment, and the defendant appealed to this court.

ISAAC BAGGS, for appellant.

R. T. SPRAGUE, for respondent.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

Ejectment for the recovery of mining claim.

The plaintiff in this suit sues for the recovery of a certain interest in mining claims in Shasta, the title to which he asserts to have been in himself and several others, in certain fixed proportions.

It is objected that the plaintiff can not recover because he has not joined the other owners or claimants. We do not consider this point well taken. In order to a full vindication of plaintiff's rights, and full investigation of the merits of the controversy, it was only necessary to sue the party who interfered with the plaintiff's property, or did him wrong. The object of the plaintiff in the suit was not a partition of the common property, but to settle the right of the plaintiff, as against an adverse claimant, to his share and proportion; and this object could be effectually attained by the plaintiff in the form adopted. The question of abandonment was fairly left to the jury, as also the right of the defendant under the bill of sale from Julian. The claims, it seems, were held in possession by the partners and associates of the plaintiff; they, as such partners, were tenants in common, and it is well settled that the possession of one partner or tenant in common is the possession of all. The mere fact that one tenant in common, or partner, goes away and remains absent from the premises of the joint business, or property, leaving his associates in possession, creates no presumption of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. In order to the enforcement of the claim, some appropriate action by suit must be taken to liquidate the demand, and sell the property, or there must be at least clear and unequivocal proof of abandonment.

It is too clear for argument, that the mere passive acquiescence of the other partners or tenants in common in a sale

of the interest of the plaintiff by a party having no title, can not confer any upon the vendee. This would be to make title to property pass, not by the act or assent of the owner, but by the silence of his associates.

The plaintiff's right having been fixed by these rules of property, which are a part of the general law of the land, could not be divested by any mere neighborhood custom or regulation, even if there were better proof than appears in the record of the existence of such. Nor do we see anything to prove that, by the mining regulations of the vicinity, the possession and working of the claim by a portion was not a sufficient possession and working for all; or that the mere temporary absence of one partner was a forfeiture of his interest, and that a stranger could then come in and appropriate his share.

On the whole, we think the learned judge below presented the law fairly and clearly to the jury, and that their finding was in accordance with law and justice.

Judgment affirmed.

BURKE ET AL. v. THE TABLE MOUNTAIN WATER CO. ET AL.

(12 California, 403. Supreme Court, 1859.)

Insufficient denial in ejectment—Admission by failure to fully deny. An answer which denies that this defendant has "unlawfully, wrongfully and in violation of plaintiffs' rights, had the possession," etc., does not thereby put in issue the fact of possession, but merely the character of it, and the allegation of possession being material, a failure to deny is an admission of it.

[1] **Sufficiency of notice to produce papers—Description.** The sufficiency of notice to produce a paper shown to be in the possession of a party, is a question of discretion, and if it were impossible to procure it between the time of giving notice and the trial, the fact should be made to appear. Such a description of the paper as will apprise a man of ordinary intelligence of the document desired, is enough.

Proof of possession. Where one of two defendants had surrendered possession of the premises in controversy to the other, this fact was sufficient to support the finding that the latter was in possession.

[1] *Cole* v. *Cheovenda*, 4 Colo. 17.

Reasons for finding no part of judgment. The reasons given for a finding are not judgments. The point decided is the thing fixed by the judgment.

[1] **Finding of fact not conclusive as to right.** A finding that a defendant is not in *fact* in possession of the premises in controversy, is not conclusive as to his *right* of possession.

Evidence of surrender of possession. An "agreement of cancellation" of a lease of a ditch and the surrender of possession to the lessor, although no consideration may have been expressed in the agreement, is sufficient to justify a finding that the tenant (defendant in ejectment) was not in possession of the premises.

Appeal from the Fifth District, County of Calaveras.

This was an action of ejectment to recover the possession of a certain ditch for the conveyance of water for mining purposes.

The complaint sets out the title of plaintiffs, and avers "that the defendants, the Table Mountain Water Company and A. B. Laforge, well knowing the premises, and well knowing the plaintiffs were the owners of such property and entitled to the possession and use thereof as aforesaid, have unlawfully, wrongfully, and in violation of the rights of the plaintiffs herein, at all times since the said fifteenth day of March, A. D. 1858, had the possession thereof, and ever since said day wrongfully and unlawfully detained possession of the same from these plaintiffs; and that said defendants do now wrongfully and unlawfully detain the possession," etc.

This allegation is attempted to be traversed in the answer of the Table Mountain Water Company by the following:

"The said defendants, the Table Mountain Water Company, for answer to the plaintiffs' complaint denies that the said company has unlawfully, wrongfully, and in violation of plaintiffs' rights, had the possession of the certain ditch, canal or flume, described in said plaintiffs' complaint, and denies that they unlawfully and wrongfully detain the possession of the same."

The cause was tried in the court below without a jury, and by the findings of the court, it appears that on the twelfth day of February, 1857, a judgment of foreclosure of mortgage of the premises, in favor of *Rowe* v. *The Table Mountain Water Company*, was duly rendered in the District Court

[1] Cited *Hawkins* v. *Reichert*, 28 Cal. 536.

of Calaveras county, and that subsequent the property was sold under the decree; that at such sale, Bowman and plaintiff Hughes became the purchasers, and a deed was duly made by the sheriff, conveying to them the premises; that subsequently Bowman sold and conveyed his interest to the plaintiff Burke.

On the thirty-first of October, 1856, the Table Mountain Water Company leased the premises to the defendant Laforge for the term of five years, and under this lease he entered into possession. On the sixteenth of March, 1858, and before the commencement of this suit, Laforge, by a written contract with the company, surrendered to them the possession of the ditch. This action was commenced on the twelfth of April, 1858, and the court finds that plaintiffs were then the owners, and entitled to the possession of the ditch.

On the day of trial, plaintiffs served upon the defendants notice to produce on trial "the written agreement canceling the lease alleged to have been made between A. B. Laforge and the Table Mountain Water Company—said agreement having been made by A. B. Laforge and the Table Mountain Water Company—or parol evidence will be given of its contents." The lease was signed by the individual members of the company, and the agreement surrendering possession is alleged was made to them. The defendants did not produce the agreement, and parol evidence was admitted on trial of its contents. Plaintiffs had judgment against the Table Mountain Water Company only, no judgment being taken against Laforge. All of the defendants appealed to this court.

ROBINSON & BEATTY and HARDY & VAUGHN, for appellants.

LATHAN & SUNDERLAND, for respondent.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., and FIELD, J., concurring.

This action of ejectment was brought to recover a certain ditch. One Laforge was a defendant, but no judgment was recovered against him. The complaint charges that the defendant —The Table Mountain Water Company—was in possession.

The answer of the company does not deny this averment in any such manner as to put it in issue. The answer denies that this defendant has "unlawfully, wrongfully, and in violation of plaintiffs' rights, had the possession," etc. But this might be perfectly true, and yet the defendant be in the possession. What the complaint called the defendant to answer was not only the character of the possession, but the fact of possession by it, and a failure to deny this averment is an admission of it. This admission is conclusive evidence of the fact admitted. It is, therefore, immaterial, so far as the company are concerned, whether the court erred or not in its admission or rejection of evidence in respect to an admitted fact—though we are not satisfied, as will be seen hereafter, that any substantial error was committed to the injury of the defendants. Laforge was discharged from the suit. The court found he was not in possession; hence, he could not be sued in this action, and was properly discharged. If he was in possession, The Table Mountain Water Company, having confessed their possession, and not having set up Laforge's title, or shown any connection with it, judgment was properly rendered against it. But it is argued that error has been committed to the prejudice of Laforge; that though the judgment was for him, yet the predicate of that judgment was the finding that he was not in possession, and had surrendered all his right to the Table Mountain Water Company, or the members of it, and the control of the property; and that this finding was improperly made in this, that parol evidence was admitted of a certain paper purporting to be an agreement of cancellation of a lease from the company to Laforge. Notice was served on the defendant's attorneys, on the day of the trial, to produce this paper. It was shown that this paper was that day in possession of one of the attorneys of defendant. The sufficiency of notice to produce a paper shown to be in possession of a party is a question of discretion; and if it were impossible to procure it between the time of giving notice and the trial, that fact should be made to appear. In this instance, it does appear that the paper was present, or in the hands, or within the control of the defendant. There is nothing in the technical point that the agreement was between the members of the company and Laforge, and not between Laforge and the com-

pany. Literal accuracy can not be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is enough. Nor is there anything in the point that the witness Brady testified that no consideration was expressed in this instrument. We understand him only to say that Laforge was to be paid for some improvements, and *this* was not expressed in the writing. The fact that the agreement was executed and carried into effect, and the further fact that the defendants refused to produce the paper, go far to show that it was a valid agreement; but whether it was or was not, if Laforge surrendered the possession to the company, it was enough to support the finding that the company was, and Laforge was not, in possession. The company did not set up this agreement—indeed, could not—and Laforge by it parted with any possession he had before.

The judgment is affirmed.

On re-hearing in this case, the following opinion was rendered by BALDWIN, J., TERRY, C. J., and FIELD, J., concurring.

On petition for a re-hearing.

The finding which is objected to is that Laforge was not in possession. To prove that he was not, parol evidence of the contents of a paper purporting to be an agreement of a cancellation of a lease was offered and admitted. It was objected that no consideration was shown for this agreement. But as a verdict could not be found against Laforge, unless he was in possession, we do not see that this proof was inadmissible, for the agreement was evidence of a surrender of a former possession, whether there was a consideration or not. The finding was, therefore, right. At least, Laforge can not complain. Judgment is for him. The reason given for the conclusion is not *res judicata* as to him, so as to bind him in any future proceeding. Though the court decided he had no title and no possession, and therefore he was improperly joined as a defendant, yet it also decided that the plaintiff had no claim on him, and could recover nothing. We do not understand that the reasons given for a finding are judgments. The point decided is the thing fixed by the judgment, but the reasons

are not. The only point adjudged is the fact that Laforge is not in possession, and that result was reached by testimony proper for that purpose. His *right* to the possession, if he has any, is not concluded by this judgment and finding. But there was evidence enough for the court below to base its action on—that he was not, *in fact*, in possession; and this is the only *fact* really decided. See *Garner* v. *Marshall*, 9 Cal. 270.

Laforge's right is just as good, therefore, now, as it was before the trial; the effect of the judgment being to determine the fact that he was not in actual possession; and, according to the case just cited, actual possession was necessary in order to sustain an action of ejectment against him.

We think, therefore, that conceding everything to the argument of the counsel—which seems to us to be more plausible than sound—there is no substantial error in the opinion which the petition reviews.

The petition is denied.

BUSENIUS ET AL. V. COFFEE ET AL.

(14 California, 91. Supreme Court, 1859.)

[1] **Admission of ouster.** An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants *wrongfully* and *unlawfully* entered and dispossessed" plaintiff, because such denial admits entry and ouster.

[2] **Instructions in ejectment.** Where, in such case, the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not

[1] As to insufficiency of denials in answer, cited as authority in *Bassett* v. *Enwright*, 19 Cal. 639; *Woodworth* v. *Knowlton*, 22 Cal. 168; *Landers* v. *Bolton*, 26 Cal. 418; *Richardson* v. *Smith*, 29 Cal. 532; *Fish* v. *Redington*, 31 Cal. 195; *Kurcyn* v. *Paugh*, January Term, 1860, not reported; and see *Hensley* v. *Tartar*, 14 Cal. 508, and citations; see, also, *Smith* v. *Richmond*, 15 Cal. 501; *Higgins* v. *Wortell*, 18 Cal. 330; *Castro* v. *Wetmore*, 16 Cal. 380; *Wells* v. *McPike*, 21 Cal. 218; *Ghirardelli* v. *McDermott*, 22 Cal. 539; *Lay* v. *Neville*, 25 Cal. 545; *Moore* v. *Del Valle*, 28 Cal. 170; *Randolph* v. *Harris*, 28 Cal. 562; *Burke* v. *Carruthers*, 31 Cal. 467; *Abadie* v. *Carillo*, 32 Cal. 175; *Reed* v. *Calderwood*, Id. 109; *Fitch* v. *Bunch*, 30 Cal. 208; *Thompson* v. *Lynch*, 29 Cal. 191; *Doll* v. *Good*, 38 Cal. 287.

[2] *Sears* v. *Taylor*, 5 M. R. 318.

error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title.

Reversal on appeal. For error in refusing to give an instruction to the jury, the Supreme Court will not undertake to determine how far the party excepting was prejudiced, but will reverse the judgment.

Appeal from the Fourteenth District.

Ejectment. The jury found for defendants. Judgment accordingly, and plaintiffs appeal.

FRANCIS J. DUNN, for appellants.

The court erred in refusing to give the first instruction asked by plaintiff, which instruction was to the effect that the pleadings in the case admitted entry and ouster, and that the only question with the jury was, who had the best right. The answer conceded entry and ouster: Pr. Act, Secs. 46–51, 65, 66; *De Ro* v. *Cordes*, 4 Cal. 117; *Dewey* v. *Bowman*, 8 Id. 145; *Humphreys* v. *McCall*, 9 Id. 59; *Texer* v. *Gorwin*, 5 Duer, 389; *Thompson et al.* v. *Lee et al.*, 8 Cal. 275.

T. B. MCFARLAND, for respondents.

The court below did not err in refusing to instruct the jury "that under the pleadings in this case, the entry of defendants and ouster of plaintiffs is admitted." The answer of defendants does not admit the entry or ouster, but specifically denies the same in the precise words in which the allegation is made in the complaint, and this has always been held a sufficient denial: Chit. Pl. Vol. 1, 605, *et seq.* The specific denial in the first part of the answer is not changed or waived by the claim of ownership therein afterward set up. The proof, indeed, shows that the only question between the two parties was as to the ownership of the ground in dispute; but this instruction relates only to the pleadings, and the latter do not show that the ground, in relation to which the entry and ouster are alleged in the complaint, is the same ground claimed in the answer. And then, the instruction embodies both entry and ouster; and, grant-

ing that the answer admits entry, it certainly does not admit ouster. The latter can occur only where a party has had possession, or, at least, is entitled to possession; and the owner does not, in any part of it, admit that plaintiffs were ever in possession, or entitled to the possession, of the ground in dispute: Blac. Com. Vol. 3, 167; Chit. Pl. Vol. 1. 191 *et seq.*

But admitting, for the sake of argument, that the refusal to give this instruction was an error, still it is no ground for reversal of the judgment, because it appears on the face of the record that plaintiffs could not have been, and were not, in the least, injured by such refusal. The evidence shows that the only question contested before the jury was as to the right of possession of the mining ground in dispute: *Johnson* v. *Sepulbeda*, 5 Cal. 149; *White* v. *Abernathy*, 3 Id. 426; *McEwen* v. *Johnson*, 7 Id. 258; *Priest* v. *Union Canal Co.*, 6 Id. 170.

The first instruction asked by plaintiff is erroneous, because it contains this: "The only question with the jury was, who had the best right."

In an action of ejectment the plaintiff can not recover by a comparison of titles, but on the strength of his own. The plaintiff must prove a legal title in himself, and a defendant may have a mere naked possession without right, and continue legally to hold as against a plaintiff, who proves an insufficient title.

COPE, J., delivered the opinion of the court, BALDWIN, J., concurring.

On the trial of this cause the court was asked by plaintiffs' attorney to instruct the jury that, under the pleadings, the entry of the defendants, and the ouster of the plaintiffs are admitted, and that the only question for them to determine is as to who has the better right to the premises in dispute. The instruction was refused, and this refusal is assigned as error. The complaint is verified, and sets forth that the plaintiffs are the owners and entitled to the possession of certain mining claims therein described, and that the defendants wrongfully and unlawfully entered upon and dispossessed the plaintiffs of the same. The answer denies

specifically the allegation of ownership and right of possession, and, in reference to the allegation of entry and ouster, denies that the defendants *wrongfully and unlawfully* entered and dispossessed the plaintiffs, as alleged in the complaint. The facts of *entry* and *ouster* are the only issuable facts presented in this allegation, and in the absence of a denial in positive and unequivocal terms, they are, for the purposes of the action, to be taken as true: Pr. Act, Sec. 65. The answer contains no such denial, but, in effect, admits the truth of the *facts* charged. The denial refers to the *character* and not to the *existence*, of these facts. In other words, the answer, in effect, admits that the defendants entered upon the claims in question, and ousted the plaintiffs, but denies that such entry and ouster were wrongful and unlawful. No question of fact is presented by this denial, and the court should have so instructed the jury.

The latter part of the instruction is not, as supposed by the counsel for the respondents, obnoxious to the objection that it violates a well established principle of law, that a plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of that of his adversary. The plaintiffs will not, in any event, be entitled to recover, unless they establish *prima facie* a valid title to the property. It appears from the pleadings, however, that the title is claimed by both parties, and the validity and relative superiority of these conflicting claims were the practical questions submitted to the jury, and to which the evidence was directed. The spirit of this part of the instruction is, not that the plaintiffs could recover upon an imperfect title, but that these conflicting claims of title were the only subjects for the jury to consider.

We can not undertake to determine to what extent the plaintiffs were prejudiced, or whether prejudiced at all, by the refusal of the court to give this instruction. The record does not, of course, furnish us with a perfect history of the trial, and even if it did, the grossest injustice might be done if we should decline to interfere with the judgment upon the ground that the action of the jury was not influenced by the error of the court.

Judgment reversed and cause remanded.

SMITH ET AL. v. DOE ET AL.

(15 California, 101. Supreme Court, 1860.)

Constructive denial of possession. In an action to recover mining ground, the general allegation of plaintiff that he is in possession of a large tract of land for mining and agricultural purposes, no specific occupation of the particular portion of the ground in controversy nor the character of plaintiffs' possession being shown although such allegation of possession be not denied in terms, yet it is sufficiently denied by an answer, which avers that the defendant entered upon the land for mining purposes as a part of the public domain.

[1] **Miner no trespasser—Statutory presumption as to public lands.** A party entering upon mineral land for the purpose of mining can not be presumed to be a trespasser; for if the land be not private property he has the right to enter upon it for such purpose; and until it is shown that the title has passed from the government, the statutory presumption that it is public land applies.

[2] **Location of farming claims in mining districts.** The mere entry upon and possession of a given portion of the public mineral lands in California, gives no title as against the general right to enter upon the same for mining purposes; they can not be appropriated in large tracts for agricultural or grazing purposes as against the miner, although lasting or valuable improvements will be protected, and in this matter no general rule can be laid down, but each case must be decided upon its own facts.

Appeal from the Fifteenth District.

Action to recover possession of certain mining ground, and for an injunction restraining defendants from digging up the soil and removing the gold therein and from undermining a fence thereon.

The complaint avers in the matter of possession and ouster "that by virtue of a certain deed, * * * the plaintiffs then became and still are seized in fee of the lands therein particularly described. * * * That on said day and date the plaintiffs entered and took possession of and have ever since actually occupied the whole and every part and portion of the said land. * * * That since plaintiffs entered into the possession of said land they have ever resided on the same with their respective families, and have expended large sums of money, to wit, seventy thousand dollars, in various improvements thereon for agricultural and mining purposes, in build-

[1] *Brandt* v. *Wheaton*, 1 M. R. 145.

[2] *Wixon* v. *Bear River Co.*, 1 M. R. 656.

ing fences, planting fruit trees and vines, erecting dwellings and quartz mills, with their machinery, enjoying the sole use, benefits and profits of the said lands, by working the same upon and beneath the surface, without molestation or hindrance to their free, full and sole occupation in every part and portion thereof, except, etc., etc. That while the plaintiffs were in the full enjoyment, peaceable possession and sole occupation of said lands, the defendants unlawfully entered upon a portion of the same with force and arms and ousted the plaintiffs therefrom." * * *

The answer denies these allegations in these words:

"These defendants deny that plaintiffs became and still are seized in the lands described in their complaint; * * * and deny that plaintiffs entered and took possession of said lands on the day and date of said deed; and defendants deny that their mining claim, which is located * * * has ever been in the possession and actually occupied by plaintiffs; * * * [Here follows averment that the land is mining land,] * * * and deny that they have ousted plaintiffs from said described premises complained of by plaintiffs. Defendants deny * * * or that they are proceeding unlawfully to take out and carry away," etc.

The complaint also avers that defendants are digging up the ground and undermining the eastern line of the garden fence of plaintiffs, partly a stone wall and partly a post and wood fence; that the piece entered upon by defendants contains valuable deposits of gold, the property of plaintiffs, which defendants are unlawfully taking out and carrying away, to the irreparable injury of plaintiffs; that defendants threaten to dig up and remove the soil from said ground into the river, and leave said piece of ground a barren waste, and that it is now well suited to agricultural purposes; that these acts of defendants are a wanton and unnecessary destruction of plaintiffs' property, and to their injury in the sum of, etc.; and that defendants are insolvent.

Defendants also deny these allegations, except that as to the extent of plaintiffs' improvement, which is not denied. Defendants aver that if it becomes necessary to remove the garden fence of plaintiff they will first pay him for the same, according to law.

The court below found "that defendants, in their trespass complained of, were working an injury to plaintiffs' possessions, and that a continuance of the same would produce an irreparable injury to said possessions," and then, as stated in the opinion of this court, gave plaintiff judgment on the pleadings, for the possession of the premises, and also perpetuated the injunction, granted on filing the complaint, restraining defendants as prayed for.

Defendants appeal.

ROBINSON, BEATTY, & HEACOCK, for appellants.

BURT & RHODES, for respondents.

COPE, J., delivered the opinion of the court, BALDWIN, J., and FIELD, C. J., concurring.

This is an action to recover possession of certain mining ground situated in Butte county. The pleadings are verified. The plaintiffs aver that they acquired from one Larkin a title in fee simple to a tract of land, containing several hundred acres, and including the mining ground in controversy; and they claim under the title thus acquired, and their actual possession of the land at the time of the entry by the defendants. They aver also that the land was occupied by them for agricultural and mining purposes, but do not state that any use was made of the particular portion now held by the defendants. The averment is general, that the whole tract was possessed and occupied for these purposes. The case was tried by the court without a jury, and after the introduction of evidence by both parties, a judgment for the plaintiffs was rendered upon the pleadings alone. No facts are found, the court holding that the material allegations of the complaint were not denied by the answer, and that the plaintiffs were therefore entitled to recover. "The material averments of the complaint," says the court, in its decision, "are not denied by the answer. Possession and ouster being sufficient to maintain the action, I do not deem it necessary to pass upon the plaintiffs' title derived from Larkin." The denial of this title was regarded as sufficient, but as the plaintiffs relied upon their possession as well as their title, and as the allega-

tion of possession, and the subsequent allegations of the complaint were not denied, it was held that the answer presented no obstacle to a recovery. The pleader evidently intended to deny specifically each of these allegations, but it is clear that he has failed to do so, and that each and all of the denials are fatally defective. But while we agree thus far with the court below, we do not concur in the conclusion that the plaintiffs were entitled to recover upon the pleadings. The defendants set up as affirmative matter in defense of the action, that at the time they entered upon the ground in dispute, it was a part of the public domain of the United States, and contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. These facts being proved, the plaintiffs could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable. They were not entitled to recover upon the pleadings, for the reason that the character of their possession did not appear. It is not alleged, as we have already stated, that this particular ground was ever used by them in any manner whatever. The complaint contains only the broad, general allegation, that they were in possession of the land purchased of Larkin, and occupied the same for agricultural and mining purposes. This is not such a possession as can be relied upon to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining.

It is provided by statute, "that all lands in this State shall be deemed and regarded as public lands, until the legal title is shown to have passed from the government to private parties:" Wood's Dig., 527. The presumption created by this statute is not necessarily irreconcilable with the presumption of ownership arising from the mere fact of possession. This presumption is constantly indulged in favor of the possessor against a trespasser; but we held in *Burdge* v. *Smith*, 14 Cal. 380, that when a person goes upon mineral land for the purpose of mining, he can not be presumed to be a trespasser; for if the land be not private property, he has the right to enter upon it for that purpose; and until it is shown that the

title has passed from the government, the statutory presumption that it is public land must apply. The doctrine, that by mere entry and possession, a right may be acquired to the exclusive enjoyment of any given quantity of the public mineral lands of the State, has been repeatedly condemned by this court, and if it could be maintained, would be fraught with the most pernicious and disastrous consequences. The appropriation of these lands in large tracts for agricultural and grazing purposes, and the concentration of the mining interest in the hands of a few persons, to the exclusion of the mass of the people of the State, are some of the evils which would necessarily result from such a doctrine. It must not be understood, however, that within the limits of the mines all possessory rights, and all rights of property not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected; as also, growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining, and the examples we have given may serve, in some measure, to indicate the proper modifications of this rule, and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the government in this respect.

The judgment must be reversed, and the cause remanded for a trial upon the merits. The defendants should be permitted to amend their answer upon such terms as the court below may deem just and proper.

Judgment reversed, and cause remanded.

On petition for rehearing, COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

The tone of the petition in this case, though disrespect is disclaimed, is scarcely decorous. We merely allude to this circumstance that we may have no occasion to notice any deviation from strict professional propriety, in this respect, in future.

We still adhere to our former view of the case. The only question is, whether the mere possession of a large tract of mineral land is sufficient to support ejectment, as against a person entering upon and occupying the land for mining purposes. We held that it was not, and we see no reason for changing that opinion. The counsel for the plaintiffs seem to forget that the case was decided upon the pleadings alone. They say, "Surely, no one can suppose that where a plaintiff's case was made out, the mere allegation of affirmative matter by a defendant would be sufficient to defeat it." Surely, no one can suppose that a plaintiff is entitled to recover upon the pleadings, when the answer contains affirmative matter which, if true, constitutes a valid defense to the action.

The injunction must follow the determination of the legal rights of the parties, but the court is vested with ample power to preserve the property, pending the litigation.

Rehearing denied.

EAGAN ET AL. v. DELANEY ET AL.

(16 California, 86. Supreme Court, 1860.)

Plaintiff must recover upon title averred. In ejectment for a mining claim, where plaintiff, in his complaint, avers the facts upon which his title is based, he must be held on the trial to the title alleged, and defendant may well claim surprise if another and different title is allowed to be proved; and such surprise will be good ground for a motion for new trial.

Where facts constituting the title are averred, they must be proved as laid.

Appeal from the Eleventh District.

Plaintiffs claim to be the owners of a certain piece of min-

ing ground described in their complaint, and allege that the same was taken up in 1856 by certain parties in the complaint named.

The complaint then states particularly the several transfers which had been made of the claims from the first locators, and shows that plaintiffs have obtained the title of the first locators of the claim.

The complaint then alleges that defendants have entered upon a portion of the ground therein described.

The answer denies that plaintiffs, or those through whom they claim title, were ever the owners of the ground upon which defendants are at work.

No other title is set up or relied upon in the complaint except that derived from the earlier owners by purchase.

The dispute between the parties was, whether a certain line marked "center line" was the center line or the west line of plaintiffs' claims.

It was conceded by defendants that plaintiffs' claims had been located as early as 1856, and that plaintiffs had regularly derived title to the same. But the defendants contended that the line marked "center line" was the west line of plaintiffs' claims, and that the defendants' ground was not included.

It was shown at the trial by the testimony of J. W. Dodge and John S. Fox, two of plaintiffs' immediate vendors, as well as others, that said "center line" was the west line of plaintiffs' claim, as marked out in 1857 in their presence, and that none of the ground claimed by defendants was included. It was also found by the court as a fact, that none of the ground claimed by defendants was ever included in the claim of plaintiffs while the same was the property of plaintiffs' vendors, and as marked out in 1857; nor had plaintiffs worked any ground west of the center line when defendants began working it.

At the trial, the court permitted evidence to show that when Fox and Dodge, who took up the claims with plaintiff Eagan, in 1856, sold out their interest to Stewart, one of the plaintiffs, in July, 1858, they represented to Stewart that their claims extended two hundred feet west of said "center line," and that afterward plaintiffs claimed the same as

their ground, and that such claim was so made before defendants went upon the same; and the court found that at this purchase, in 1858, there was no adverse claim to the ground two hundred feet west of the "center line" and that defendants began working this two hundred feet in the fall of 1858.

Upon these facts the court found, as a conclusion of law, that plaintiffs were entitled to recover, not upon the title set up in the complaint, but upon the purchase in July, 1858, from men who at the time did not own the ground as was conceded—the court holding that plaintiffs were not limited to the boundaries claimed by their vendors, there being at the time no adverse possession or claim.

When plaintiffs closed their case, defendants moved to strike out all evidence of plaintiffs' title which did not go to support the title set up in the complaint.

The court overruled the motion, and defendants excepted.

Plaintiffs had judgment; defendants appeal.

JOHN HUME, for appellants.

SANDERSON and NEWELL, for respondents.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

This was a suit for the recovery of a mining claim.

The plaintiffs stated in the complaint their title, its origin and deraignment; and upon the title thus set out, claimed a recovery. The answer denied the title thus set up. Upon the trial the plaintiffs proved, as they claim, a title accruing to them in a particular way, subsequent in origin and different in the mode of acquisition from that counted on in the complaint. Perhaps it was not necessary for the plaintiffs to set out the particular facts constituting their title in this action; but having done this, it would seem they should be held to prove it as averred, at least in substance; and that they can not, against the defendants' objection, recover on another and a different title.

The defendants made an affidavit, on motion for a new trial, on the ground of surprise, arising from the frame of

the pleadings, and averring that they could have introduced testimony rebutting the plaintiffs' case but for this surprise.

We think, under the circumstances, a new trial should have been granted.

Judgment reversed.

CORYELL ET AL. v. CAIN.

(16 California, 567. Supreme Court, 1860.)

Form of complaint in ejectment. In ejectment for a mining claim it is only necessary to allege in the complaint, that on some day designated the plaintiffs were possessed of the land, describing it: that whilst thus possessed, the defendant entered upon the same and ousted them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster.

Mesne conveyances not to be pleaded. It is unnecessary to set forth the transfers by which plaintiffs derive title, and such matters will be stricken out on motion.

Ruling by consent not reviewed. A ruling made by consent of parties can not be subject of consideration in the Supreme Court.

Pre-emption claimant may show other title. The designation by the plaintiffs in their complaint of the property in controversy as part of a pre-emption claim does not preclude them from relying on any other source of title than the United States or the State.

Presumption of grant to first appropriator. In determining controversies for the possession of mining claims, water privileges and the like, the court proceeds upon the presumption of a grant from the government to the first appropriator of such mines and water privileges, and this presumption is held absolute in all such controversies.

[1] **Possession—What is sufficient on the public domain.** The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation—a subjugation to the will and control.

[2] **Rule as to title in third party modified.** The general rule that the claimant in ejectment must recover upon the strength of his own title has, from the anomalous condition of things arising from the peculiar character of the mining and landed interests of California, been to a certain extent qualified and limited.

Defect in complaint ignored after verdict. The complaint alleged an ouster in 1856 and that plaintiffs' title was acquired in 1859: *Held*, if not a clerical error, it is a defect which can not be taken advantage of after verdict.

[1] *Mallett* v. *Uncle Sam Co.*, 1 M. R. 17.

[2] *Golden Fleece Co.* v. *Cable Co.*, 1 M. R. 120.

Appeal from the Fourth District.

The complaint alleges that in August, 1850, one Morris was in possession of the land sued for; and then goes on to set forth numerous transfers from Morris, until the title is vested in plaintiffs, and annexes to the complaint copies of the conveyances, which are nine in number. It also alleges the possession of the different intermediate parties during the time of their respective interests; that the last conveyance was to the plaintiffs, May 12, 1859; that they went into possession as tenants in common, and being thus possessed, defendant afterward, to wit, June 15, 1856, entered upon the land, ousted plaintiffs, and still withholds possession. These conveyances, after describing the premises by metes and bounds, designate them as part of a pre-emption claim taken up by Morris in 1850, and surveyed by the county surveyor, and recorded according to the statute. A demurrer was interposed, and subsequently overruled by consent of parties.

Further material facts appear in the opinion of the court.

Plaintiffs had judgment; defendant appeals.

JOHN MCHENRY, for appellant.

GEO. BARSTOW, for respondents.

FIELD, C. J., delivered the opinion of the court, BALDWIN, J., and COPP, J., concurring.

This is an action of ejectment to recover a tract of land situated within the county of San Francisco. The complaint is of a character which has frequently elicited observations of disapprobation from this court. It is filled with matters relating to the title of the plaintiffs, which have no place in pleadings, and should only be presented as evidence in the case. Had the defendant made the application, these matters would undoubtedly have been stricken out as redundant, at the cost of the plaintiffs. It is not within the wit of man to devise more simple rules of pleading than those prescribed by the Practice Act of this State, and there is no

excuse for any departure from them. That facts, and not the evidence of facts, should be alleged, is not less a rule of pleading in our system than it was under the former system, which has been superseded. Thus, in the present case, the complaint should only have alleged, that on some day designated the plaintiffs were possessed of the land, describing it; that whilst thus possessed, the defendant entered upon the same, and ousted them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster.

It is upon matters unnecessarily incorporated into the complaint that the objections of the appellant principally rest, and for which he seeks a reversal of the judgment. The objections raised by the demurrer we do not notice, as the demurrer was overruled by consent of parties. A ruling made by consent can not be the subject of consideration in this court.

The complaint refers, in its statement of the various transfers of the property before it reached the plaintiffs, to the several mesne conveyances of the intermediate parties from one Morris, copies of which are annexed, and made part of the pleading. These conveyances, in addition to giving a description of the premises by metes and bounds, designate them as one half of a certain pre-emption claim taken by Morris in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute. This designation constitutes the basis of the main objection urged to the complaint. The general position of counsel, as we understand it, is this: that the designation of the property, as constituting a part of a pre-emption claim, shows that it belongs either to the United States or to the State of California, and that in consequence it is essential, to entitle the plaintiffs to a recovery as against the defendant in possession, that they should allege in their complaint and establish on the trial such facts as would bring them within the provisions of the pre-emption laws of the United States, or the Possessory Act of this State. The proposition, as thus stated, can not be maintained.

The designation of the property as a part of a pre-emption claim does not preclude the claimants from relying upon any

other source of title than the United States or the State. But if we admit, for the purposes of this case, the rule to be otherwise, and that the plaintiffs are estopped from denying the superior title of the general or State government, the inference which the learned counsel would deduce from the admission does not follow. It is undoubtedly true, as a general rule, that the claimant in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that it is a sufficient answer to his action to show title out of him and in a third party. But this general rule has in this State, from the anomalous condition of things arising from the peculiar character of the mining and landed interests of the country, been to a certain extent qualified and limited. The larger portion of the mining lands within the State belong to the United States, and yet that fact has never been considered as a sufficient answer to the prosecution of actions for the recovery of portions of such lands. Actions for the possession of mining claims, water privileges and the like, situated upon the public lands, are matters of daily occurrence, and if the proof of the paramount title of the government would operate to defeat them, confusion and ruin would be the result. In determining controversies between parties thus situated, this court proceeds upon the presumption of a grant from the government to the first appropriator of mines, water privileges and the like. This presumption, which would have no place for consideration as against the assertion of the rights of the superior proprietor, is held absolute in all those controversies. And with the public lands which are not mineral lands, the title, as between citizens of the State, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual and not constructive, and the right it confers must be distinguished from the right given by the Possessory Act of the State. That act, which applies only to lands occupied for cultivation or grazing, authorizes actions for interference with, or injuries to, the possession of a claim not exceeding one hundred and sixty acres in extent, where certain steps are taken for the assertion of the claim, and to indicate its boundaries. Parties relying upon the rights conferred by

this act must show a compliance with its provisions. They can thus maintain their action without showing an actual inclosure or actual possession of the whole claim: See *Wright* v. *Whiteside*, 15 Cal. 46, and *Garrison* v. *Sampson*, Id. 93. But where reliance is placed, not upon the act, but upon the prior possession of the plaintiff or of the parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial inclosure—by cultivation, or by appropriate use, according to the particular locality and quality of the property.

The court instructed the jury that the plaintiffs, in order to recover, must show, after taking a *bona fide* possession, that they continued in actual possession until ousted by the defendant. This instruction was given at the request of the defendant, and was more favorable to him than the law warranted; yet upon it the jury found for the plaintiffs. The evidence as to the possession was conflicting, and it is our invariable rule not to interfere with the verdict in such cases. Had the verdict been for the defendant, we should not disturb it, for the same reason.

The date of the ouster—which is alleged to have taken place in June, 1856, whilst the title of the plaintiffs is alleged to have accrued only in May, 1859—is, probably, a clerical error. If not so, it is a defect which can not be taken advantage of after verdict.

Judgment affirmed.

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[1]CLEMENT ET AL. V. YOUNGMAN ET AL.

(40 Pennsylvania State, 341. Supreme Court, 1861.)

Iron furnace and ore contract—Construction, whether sale or license. Articles of agreement between Mensch and Hughes were entered into, reading in substance as follows: "M., in consideration of one dollar, receipt acknowledged, doth grant unto H., his heirs and assigns, the exclusive right and privilege of searching for, digging, raising and carrying

[1] See *Youngman* v. *Linn*, 2 M. R. 443.

away from off the land (description) all the iron ore and limestone on said land, and also timber sufficient to be enabled to work to advantage, with sufficient room for deposit of ore, limestone and dirt, and also the privilege of erecting as many necessary houses and buildings as the said H. may require for the successful operation of an iron furnace: H. agreeing to pay twenty cents for each ton of clean ore he takes from said land, in payments on each first day of January." H. entered and mined under this agreement, but erected no iron works. In ejectment by his assigns for a stone quarry of three acres on the land: *Held*, that though the operative words of the agreement would pass all title to the ore, yet that the real consideration was the erection of iron works, which not having been erected, the agreement, all its parts being considered, should be taken as a sale without consideration, and, therefore, passing no present interest.

Sufficient certainty in description. Where the description in the writ of ejectment was for a certain limestone quarry, containing about three acres, and bounded on two sides by adjoiners, a verdict for the quarry, describing the two boundaries, would have been sufficiently certain.

Error to the Common Pleas of Union County.

This was an action of ejectment, brought in the court below to December term, 1854, by Ira T. Clement and Jacob B. Masser against John Youngman and Jesse M. Walter, to recover possession of a limestone quarry and tract of land in Union township, containing about three acres.

The case was this: On the 17th of November, 1840, the following writing was executed by Nicholas Mensch, the owner of a farm in said township, and Holker Hughes.

Articles of agreement made and agreed upon the 17th of November, 1850, between Nicholas Mensch, of Northampton county and State of Pennsylvania, of the one part, and H. Hughes, of the county of Franklin and State aforesaid, of the other part: Witnesseth, that the said Nicholas Mensch, of the one part, for and in consideration of the sum of $1, to me in hand paid, the receipt of which is hereby acknowledged, doth grant unto Holker Hughes, his heirs and assigns, the exclusive right and privilege of searching for, digging, raising and carrying away from off the land hereafter described, bounded as follows: by lands of Jesse Cauley's heirs on the south, the river on the east, Mary Jenkins on the north and west, and the lands of Phillips. All the iron ore and limestone on said land, and also timber sufficient to enable said mines to be worked to advantage, with a right for roads to

and from the mines and quarries to a place of landing, and also sufficient room on said land for the deposit of ore and limestone and dirt, with free egress to and from the mines and quarries to the landing at all times; and also the privilege of erecting as many necessary houses and buildings as the said Hughes may require for the successful operation of an iron works. Hughes, on his part, agrees for himself, his heirs or assigns, at the rate of 20 cents per ton of 2,240 lbs. of clean ore he takes from said land, the payments to be made on the 1st day of January of each year from the preceding year.

In testimony whereof, the parties hereunto set their hands and seals the day and year above written.

Witness [L. S.]
[L. S.]

And Hughes further agrees with said Mensch, that if he should be compelled to use a road for the hauling of his ore, leading directly through his farm, he is to pay Mensch for the land so occupied at the rate of $50 per acre, for so much land as the road occupies.

Witness our hands and seals as above written.

NICHOLAS MENSCH. [L. S.]
HOLKER HUGHES. [L. S.]

Test:

THOMAS MCFALL,
JOHN TREGO.

By sundry assignments the interest of Holker Hughes was transferred, and on the 22d of May, 1852, vested in the plaintiffs.

The defendants were in possession of the whole farm since 1851, under Mr. Mensch.

The defense was, that the above deed or agreement did not show or purport to give title to any real estate; that it was merely the grant of an incorporeal hereditament, and vested no such interest in real estate in Hughes or his assigns as would warrant a recovery in ejectment.

The court below, WILSON, P. J., so held, and instructed the jury that the plaintiffs could not recover. There was a verdict and judgment accordingly; whereupon the plaintiffs sued out this writ, and assigned for error the following portion of the charge of the court below:

"The court erred in that part of their charge in which they say 'it was never intended by the instrument in which the grant is given, that the owner should be ejected from the soil. The grant is not of the soil, but of a right to mine and dig in it, exclusive as to strangers but not as against the owner, and is no more than a license to take and appropriate the iron ore and limestone beneath the surface, and to exclude a grant by the owners to any other person or persons of the same privilege, and vests no property in them until they are taken and appropriated.'

"The court also erred in that part of their charge in which they say 'as there is no evidence in the case by which the jury can find a special verdict as to the quantity of land, designating it by boundaries, upon which the court could give judgment without sending the sheriff to the premises, at the risk of becoming a trespasser, if he should unfortunately or by mistake deliver more to the plaintiffs than had been recovered, and the plaintiffs, or those under whom they claim, never having been in possession of this spot, under this grant, to designate a boundary or otherwise, and no draft or boundaries shown by which the jury can return by boundaries the three acres claimed. On both grounds we have thus presented, we are of opinion the plaintiffs can not recover.'"

COMLY and MILLER & ROCKEFELLER, for plaintiffs.

No argument for defendants.

The opinion of the court was delivered by STRONG, J.

In *Caldwell* v. *Fulton*, 7 Casey, 480, we held that a grant of an unlimited right, title and privilege to dig and take away the coal in a designated tract of land, to any extent the grantee might think proper, and for a consideration presently paid, was a grant of the coal itself and not merely of a license or incorporeal right. That decision was made after much consideration, and after a careful review of both the English and American authorities. We see no reason to abandon the opinion we then entertained. It is impossible to conceive of more complete dominion over coals or any minerals in place in a tract of land, than that which is comprehended in an exclusive right to search for, to dig, raise and carry them all

away. Such a right lacks nothing which is necessary to make up ownership. A grant of it is, if possible, something more than a grant of the rents, issues and profits of land which has uniformly been held to be inferentially a grant of the land itself. True, if the grant be of no more than a right to take an undefined part of the profits, the rule does not apply, for that is not entire dominion. Thus says Lord Coke, Co. on Lit. 4 V.: "If a man grant to another to dig turves on his land and to carry them at his will and pleasure, the land shall not pass, because but part of the profit is given." A right in one to take coal from a tract of land in which it lies, is perfectly consistent with the ownership, in another, of the mine from which the coal may be taken. *Lord Mountjoy's Case*, Anderson, 307, so often referred to, was but a grant of a right to take an indefinite part, or, in the words of the deed, "sufficient ores, heath, turves and other necessaries for the making of alum and copperas."

So was the grant to which construction was given in *Chetham* v. *Williamson*, 4 East, 469, a conveyance of no more than a right to search, dig for and carry away minerals. It was not exclusive of the owner of the land. In *Doe* v. *Wood*, 2 B. & Ald. 719, the grant was of minerals that should be found within the term; and such was the extent of the grant in *Grubb* v. *Bayard*, 2 Wallace, Jr., 81. But a right in one person to take all the coal or minerals in a tract of land, and to carry them away, is inconsistent with any dominion or proprietorship in another. Hence, the inference is obvious, if there be nothing in the deed inconsistent with it, that where the owner of land grants a right to search for, dig, take and carry away all the coal or iron ore, or any other mineral in the land, he intends to divest himself of all property in the coal or other mineral. Possibly a mere license or incorporeal right may be exclusive. Bainbridge, in his Treatise on the Law of Mines and Minerals, pages 254–5, seems to be of opinion that it may, but he refers to no authority to sustain his opinion, and I find none. And Lord Ellenborough, in *Chetham* v. *Williamson*, said no case could be named where one who had only a liberty of digging for coals in another's soil, had an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals

raised by him; and, after citing *Lord Mountjoy's Case*, said that those who compared it to a grant of common *sans nombre*, used that as the strongest instance to show that it could not be an exclusive right. From this language, it is evident Lord Ellenborough thought that a license is not exclusive. It would also be a just, though not an inevitable inference, that he thought a grant which is exclusive of the owner of the land and all others, is not a mere license. However this may be, it is hard to give any reason for holding that a deed which confers upon the grantee every right over its subject which an owner can exercise, does not confer ownership. If therefore, this were all that is to be found in the deed under which the plaintiffs claim, the case would be ruled in their favor by *Fulton* v. *Caldwell*.

But it is not all. To determine what the parties intended and what interest passed by it, the entire agreement between Nicholas Mensch and Holker Hughes must be considered. By it Mensch, for a nominal consideration, expressed by one dollar, granted in words, *de præsenti*, to Holker Hughes, his heirs and assigns, the exclusive right and privilege to search for, dig, raise and carry away all the iron ore and limestone on a described tract of land, and also timber sufficient to enable said mines to be worked to advantage, with a right for roads to and from the mines and quarries to a place of landing, and also sufficient room on said land for the deposit of ore, limestone and dirt, with free ingress to and from the mines and quarries to the landing, at all times; and also the privilege of erecting as many houses and buildings as the said Hughes might require for the successful operation of an ironworks. On the other side Hughes agreed to pay Mensch, his heirs and assigns, at the rate of twenty cents per ton of twenty-two hundred and forty pounds of clean ore he should take from the land, the payments to be made on the first day of January of each year. It is difficult to read this agreement without the conviction that the motive which induced its execution and the basis upon which it rests was the contemplated erection by Hughes upon the lands of Mensch.

The limestone and the ore were intended as a supply for such works. It is also apparent that the nominal consideration of one dollar was not regarded as an equivalent for the

sale of the limestone and the ore. And it is to be observed that nothing was either paid or agreed to be paid for the limestone. If the agreement was a conveyance of the limestone and the ore, then the title passed, and Mensch parted with all his legal and beneficial interest in the former, at least without any equivalent. But was it the intention of the parties that Hughes might take out and carry away all the limestone, and leave the ore, thus obtaining one of the subjects of the grant without compensation? It is true that he covenanted to pay for all the clean ore he might take out at the rate of twenty cents per ton; but he assumed no obligation to take out any. Yet the payment for the ore taken was what was to be given for the right to take limestone, and both, evidently, as well as the other subjects of the grant, had reference to the contemplated erection of ironworks, from which it may well be supposed the grantor anticipated a benefit to his other property. In inquiring what was granted, we must look for the general purpose of the instrument. If, under the agreement, the ownership of the limestone and the ore became vested immediately in Hughes, he and his heirs might hold it forever, without erecting any ironworks, or rendering any compensation to the grantor. Is a construction of the instrument which leads to such results a reasonable one? Can the parties be supposed to have intended it? We think not. Some of the rights granted are confessedly incorporeal, and conditioned upon the erection of ironworks. The words of the premises in the agreement, standing alone, may indicate an intention to transfer ownership of the stone and minerals to the grantee, but against it is opposed the significant fact that no equivalent was to be given for either the one or the other until the ore should be taken, and there was no obligation even to take it. What Hughes was to take, as well as when he was to take, is left uncertain. In view of this it is hard to believe that the parties contemplated an immediate divestiture of ownership by one, and an acquisition by the other. This was a matter considered of importance in construing the deeds before the court, in *Chetham* v. *Williamson* and in *Grubb* v. *Bayard*. The deed of Mensch to Hughes is not a lease or a deed reserving rent, in which the covenant to pay rent is a consideration. It does not, therefore, resemble the lease

construed in *Harlan* v. *the Lehigh Navigation and Coal Company*, 11 Casey, 287. A sale without consideration paid, or agreed to be paid, is not to be held as having been intended by the parties, unless the language of the instrument shuts us up to such a conclusion.

Looking then to all parts of the agreement, those already noticed, as well as the fact that the subject-matter thereof was in many particulars undefined and undefinable until ironworks should be erected, we are unwilling to say that it vested in Hughes a corporeal hereditament, such as is essential to the maintenance of an action of ejectment.

The opinion we entertain of the agreement takes away all importance from the second assignment of error. We may say, however, that a verdict for a limestone quarry, two boundaries of which are described, appears to us to be sufficiently certain.

Judgment affirmed.

ROWE ET AL. v. BACIGALLUPPI ET AL.

(21 California, 633. Supreme Court, 1863.)

Objections to misjoinder, how taken. By the Practice Act in California objections to the misjoinder or non-joinder of parties must be taken by demurrer or answer, and if not so taken are to be deemed waived.

Nonsuit because of misjoinder. A motion for nonsuit on the ground of misjoinder should not be granted if it appear that some of the plaintiffs are entitled to recover.

[1] **Tenant in common may recover against trespasser.** A tenant in common of a mining claim is entitled to recover in ejectment against mere trespassers even though there is a misjoinder of parties plaintiff, if defendants do not take advantage of such misjoinder by demurrer or answer.

Appeal from the Sixteenth Judicial District.

The plaintiffs (seven in number) sued to recover a mining claim, averring in their complaint, title and right to possession in themselves and an entry and ouster by defendants.

The answer denied the plaintiffs' title, admitted possession

[1] *Waring* v. *Crow*, 5 M. R. 204.

in defendants, and asserted their right to possession by virtue of an independent and better title.

Plaintiffs proved on the trial, that a number of persons, composing what was commonly called the "Morgan Company," located the claim in 1852, and that it was afterward worked and possessed by persons claiming to be members of that company down to the time of the eviction by defendants in 1859, and that W. S. Rowe, one of the plaintiffs, was also one of the original locators and still retained his interest. The other plaintiffs were not original locators, and as to most of them, there was no proof showing that they had ever acquired any interest in the claims.

Defendants moved for a nonsuit on the following ground: "That the claim in dispute was located, owned, and in the possession of other parties (except plaintiff Rowe) than the plaintiffs, and that plaintiffs have not shown any sale or transfer by deed, bill of sale, or otherwise, from the original owners to themselves."

The court granted the motion and entered judgment accordingly, from which the plaintiffs appeal.

H. P. BARBER, for appellant.

1. By section forty five of the Practice Act objection to a misjoinder or nonjoinder of parties not apparent on the record must be taken by answer. or "the defendant shall be deemed to have waived the same:" 1 Cal. 175; 4 Id. 313; 6 Id. 164; 16 Id. 557.

2. The plaintiff Rowe is admitted to have been in actual possession from 1853 up to 1859, the time of the eviction. His possession was long anterior to that of defendants, and as no evidence was given by them tending to show any right of possession it is difficult to conceive why he was not entitled to recover the possession of the entire premises: *Touchard* v. *Crow*, 20 Cal. 150; *Clark* v. *Huber*, Id. 196.

He was a tenant in common, and the possession of one tenant in common is the possession of all: *Waring* v. *Crow*, 11 Cal. 366. And ejectment under our system is a mere possessory action: *Yount* v. *Howell*, 14 Cal. 466.

CALEB DORSEY, for respondents.

Appellants contend that if any of the matters stated in section forty of the Practice Act do not appear on the face of the complaint, but in reality exist, the objection to those matters, if not taken by demurrer or answer, is waived. How such an objection could he taken either by demurrer or answer I can not perceive. The matters in the complaint to which objections can be taken, either by demurrer or answer, must appear on the face of the complaint, or be within the knowledge of defendants. In this case, the want of common interest in the subject-matter in dispute on the part of plaintiffs was not discovered until it was disclosed by the evidence adduced at the trial. As those matters did not appear on the face of the complaint, and were not within the knowledge of defendants, it was impossible to take the objection by answer Whenever the want of common interest on the part of plaintiffs, during the progress of the case, is discovered from the evidence, a motion for a nonsuit is proper: *McDonald & Blackburn* v. *The Bear River and Auburn W. & M. Co.*, 13 Cal. 238.

Although, under our statute, joint tenants and tenants in common can jointly or severally bring or defend any civil action, still when the action is brought jointly they must prove a joint interest in all to enable them to recover; for if all do not recover, none can.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

This is an action to recover possession of a mining claim in the county of Calaveras. The appeal is from a judgment of nonsuit, and the only question is whether the nonsuit was properly granted. It was granted on the ground of a misjoinder of parties, there being as to some of the parties plaintiff no evidence of any interest in the subject-matter of the suit.

By the forty-fifth section of the Practice Act objections to the misjoinder or nonjoinder of parties must be taken either by demurrer or by answer, and if not so taken are to be deemed waived. In this case the objection was not taken by demurrer or by the answer, and we are of opinion that the nonsuit ought not to have been granted except as to the

parties who failed to establish an interest in the property. It is admitted that as to the plaintiff Rowe the evidence was sufficient, and under the statute no question of a misjoinder could arise at the trial preventing a recovery on his part. His position, according to the complaint, was that of a tenant in common with the other plaintiffs, and as against mere trespassers, as the defendants would seem to be, there can be no doubt of his right to recover.

Judgment reversed, and cause remanded for a new trial.

BELL ET AL. v. BROWN ET AL.

(22 California, 671. Supreme Court, 1863.)

Pleading--Double defense. In an action of ejectment for a mining claim, the complaint, which was verified, alleged title and possession in the plaintiffs on a certain day; the defendants, by answer, also verified, denied: 1. The title and possession of the plaintiffs on the day named or at any time; and averred, 2. That if the plaintiffs ever had title they had abandoned and forfeited it: *Held*, that the defendants had the right to set up both defenses in their answer, and to support both by proof, and that it was error to compel them to elect on which defense to rely.

Inconsistent and contradictory defenses—Perjury. The Practice Act of California allows a party to set up as many defenses as he may have, and this rule is as old as the common law; but one who verifies an answer which contains a direct averment and also a direct denial of the same fact, is guilty of perjury. The inconsistent defenses which he is allowed to plead are those which are not directly contradictory, but only so by implication of law, *e. g.*, set-off, discharge in bankruptcy, the Statute of Limitations, etc.

[1] **Proof of abandonment under general denial of title.** The allegation that the plaintiffs had the title to the mining claim in controversy at the date of the defendants' entry being material, the defendants may, under a general denial, prove an abandonment and forfeiture of the plaintiffs' claim previous to the defendants' entry.

Appeal from the Eleventh Judicial District.

HEREFORD & WILLIAMS, for appellants.

S. W. SANDERSON, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

[1] *Atkins* v. *Hendree*, 2 M. R. 328; *Willson* v. *Cleaveland*, 30 Cal. 192.

The complaint in this case was filed on the twenty-second day of September, 1862, was duly verified, and alleges that on the —— day of August, 1861, the plaintiffs were the owners and in the quiet and peaceable possession of a quartz mining claim, describing it; that subsequently and prior to the commencement of this action, and while said plaintiffs were the owners and in the possession of said claim, the defendants unlawfully entered thereon and ousted and dispossessed the plaintiffs therefrom, and have since retained the possession. To this complaint the defendants filed their verified answer: First—Denying that the plaintiffs were on the —— day of August, 1861, or at any time before or since, the owners and in the possession of the mining claim described in the complaint, or that they ever entered into the same while the plaintiffs were the owners or in possession thereof, or that they ever ousted or dispossessed the plaintiffs therefrom. Second—That the claim was mineral land, on a part of the public domain, and they set forth the mining regulations in that mining district relative to the holding of claims, averring that on the —— day of ——, 1861, they entered upon, took up, and became seized and possessed of the claim, the same being then vacant and unoccupied, and have ever since remained in possession, and on the day aforesaid they became, and ever since have been, the owners of the claim; that a dispute arose between the parties to this action, concerning the title to the claim, which was submitted to arbitrators, who awarded part to the plaintiffs and part to the defendants, to which the parties assented, and each took possession of the portion awarded to him; that if the plaintiffs ever had any title to the claim, they, prior to the commencement of the suit, abandoned and disclaimed the same, and forfeited it, by reason of not complying with the mining regulations of the district—setting forth the rule violated, and how it had been violated by the plaintiffs; that defendants have been in possession, under the arbitration, for more than one year, and have expended a large amount of labor and money in developing the claim, with plaintiffs' full knowledge and assent. An injunction was granted at the time of filing the complaint. A trial was had, and the jury found a verdict for the plaintiffs. A new trial was moved and denied,

and the defendants appeal from the judgment and the order refusing a new trial.

The plaintiffs moved to strike out portions of the answer, and that the defendants be required to elect between the defense of the denial of the plaintiffs' title and possession, and the defenses of voluntary abandonment and forfeiture, by reason of non-compliance with the mining regulations, which motion was sustained by the court, and the defendants excepted, and then elected to stand upon the defense of the denial of the title of the plaintiffs. During the trial the defendants also offered testimony in support of the defenses stricken from the answer, which was ruled out, and they excepted.

The appellants allege that the court erred in compelling them to elect between the several defenses set forth in their answer, and also in rejecting their testimony upon those portions of the answer not included in the denials of the plaintiffs' title; and on the contrary, the respondents contend that the rulings of the court were correct, because those portions of the answer were inconsistent with and contradictory of the denials.

Sec. 49 of the Practice Act is as follows: "The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished." This section applies to all answers, verified and unverified. It does not attempt to make any distinction between the two, or to make any rule which does not apply equally to both. The right to set up numerous defenses in a suit is equally as important to the defendant in the one case as the other. It is an absolute right given him by law, and the principle is as old as the common law itself. He may fail to prove one defense by reason of the loss of papers, absence, death or want of recollection of a witness, and yet he ought not thereby to be precluded from proving another, equally sufficient to defeat the action. In many cases it would be a denial of justice if a defendant should be shut out from setting up several defenses.

There is this difference, however, between verified and unverified pleadings, that if the truth of a fact is directly averred in any part of the former, whether in a complaint or answer, and then in any other part of the same pleading, whether in the statement of several causes of action in the complaint, or separate defenses in the answer, the same fact is directly contradicted or denied, the person verifying it is guilty of perjury, for both can not be true; and the averment which bears most strongly against the party so pleading will be taken as true upon the trial. But there are numerous cases, and they are the most frequent in practice, where the averments are not directly contradictory; and if they can properly be considered as conflicting at all, it is only by implication of law. As, for instance, such defenses as set-off, counter claim, discharge in insolvency or bankruptcy, the Statute of Limitations, and the like, in which matters in avoidance of the plaintiffs' claim are set up, when coupled with a denial of the plaintiffs' cause of action. In a legal sense, such defense admits, so far as that defense is concerned, that the plaintiff had a cause of action, but that it has since been satisfied, discharged or barred in the manner set forth. A defendant, sued upon an alleged contract, might very properly deny under oath that he ever made the contract, and at the same time plead one or more of these defenses, and it would oftentimes be very unjust to preclude him from so doing. It may be true that he never did make the contract, and as an honest man he could only deny it; and yet the plaintiff might be able, by perjured testimony, to prove that he did make it; or the fact may be that it was made when he was insane or helplessly drunk or under duress, which would show that it was not his contract, and yet he might not be able to prove those facts. It would be gross injustice if, because the defendant conscientiously denied the contract, he should be thereby precluded from showing a full discharge in insolvency or bankruptcy, or that the demand was barred by the Statute of Limitations. In cases where such defenses are set up, the law treats them as in the nature of pleas of confession and avoidance, as contradistinguished from the general issue or denials of the averments of the complaint, and it is assumed that, for the purposes of that particular defense, the allega-

tions of the complaint are admitted. It is similar to the rule in the case of a demurrer, which is taken as an admission of the truth of the facts stated in the pleading, against which it is interposed for the purposes only of the argument upon the demurrer. Yet, because the demurrer has been filed to a verified complaint, it is never treated as an admission by the party demurring of any fact in any subsequent proceeding in the action. In both cases it is but an admission implied by the law and not admitted or intended to be admitted in fact. There may be, and no doubt often are, cases where parties make reckless statements in verified pleadings, not only inconsistent, but directly contradictory of each other. In such cases, courts ought to deal severely with the parties, and yet it ought not to be carried so far as to prevent parties from setting up separate defenses—a right plainly secured by the statute.

The question of inconsistent defenses and hypothetical pleadings under the code has been adjudicated by the courts of other States in numerous cases, and the right of a defendant to set forth as many defenses as he thinks proper is fully recognized, and also that pleading one defense can not be held a waiver of another in the same answer, even though inconsistent. In *Sweet* v. *Tuttle*, 4 Kern. 465, *Mayhew* v. *Robinson*, 10 How. Pr. 162, and *Bridge* v. *Payson*, 5 Sandf. 210, a general denial and plea of nonjoinder of defendants were united and held good. So in *Gardner* v. *Clark*, 21 N. Y. 399, where a plea of performance and a former action pending were joined. So in *Doran* v. *Dinsmore*, 20 How. Pr. 503, where a general denial was coupled with a plea of payment. So in *Mott* v. *Burnett*, 2 E. D. Smith, 52, it was held that the defendant might deny making the note sued on, allege a set-off and that one of the makers of the note had been discharged by the holder. In an action to recover personal property it was held the defendant might answer by a general denial and set up a justification of the taking: *Harkley* v. *Ogman*, 10 How. Pr. 44. In slander, that he may deny the charge and also justify: *Ormsby* v. *Douglas*, 5 Duer, 665; *Butler* v. *Wentworth*, 17 Barb. 649; 9 How. Pr. 282. So also that pleas which were not inconsistent under the former practice are good as answers under the code: *Lansing* v. *Parker*, 9 How.

Pr. 288. Held, too, that a defendant should never be required to elect between a denial of a material allegation of the complaint and new matter constituting a defense: *Hollenbeck* v. *Cloo*, 9 How. Pr. 289; and that it was not necessary that the several defenses in an answer should be consistent with each other: *Stiles* v. *Comstock*, 9 How. Pr. 48. Also, that denials of allegations in the complaint may be coupled with a defense of the Statute of Limitations: *Ostrum* v. *Bixby*, 9 How. Pr. 57. Held, too, that a defense might be hypothetically predicated upon a fact alleged in the complaint, as an answer, after denying that the plaintiff was the owner of the note sued on, averred that *if* the plaintiff is the owner, he took it with notice of a failure of the consideration: *Brown* v. *Ryckman*, 12 How. Pr. 313; or *if* the defendants, by their agents, ever issued the certificate of deposit sued on, the same has been paid: *Doran* v. *Dinsmore*, 20 How. Pr. 503. Also held that an implied admission in one of the defenses set up in an answer will not conclude or estop the defendant from proving another defense set up in the same answer, as each defense in an answer stands by itself, and an admission in one is not available against the others: *Swift* v. *Kingsley*, 24 Barb., S. C., 541. In the case of *Ketchum* v. *Zereiga*, 1 E. D. Smith, 553, this question was very fully examined, and the right of a defendant to file inconsistent defenses and hypothetical pleadings, under proper circumstances, was fully maintained.

In the case of *Youngs* v. *Bell*, 4 Cal. 201, the right of a defendant to set up several distinct defenses, and to rely upon all of them in order to put the plaintiff to his proof, was sustained, and it was held that he was not concluded by one plea so long as he had others which went to the whole action. See, also, *Kidd* v. *Laird*, 15 Cal. 182.

We are aware that there are several decisions, both in our own and other courts, which have laid down contrary views, but the weight of principle and authority is in favor of the rule, that under proper circumstances a defendant may set up several defenses in his answer, inconsistent with each other, though each defense must be consistent with itself. The cases decided by the Court of Appeals in the State of New York, and reported in 4 Kernan, 465, and 21 N. Y. 399, seem to have settled the rule in that State. The view we take har-

monizes the new code with the well established principles of the old system of practice. Works on pleadings are full of precedents and forms recognizing fully the right of a defendant to file several pleas, which, though they might be inconsistent with each other, were required each to be consistent with itself.

There is another class of cases where facts set up in answers are apparently in the nature of pleas of confession and avoidance, but which, when carefully examined, are found to be but amplified statements, amounting substantially to a denial of one or more allegations of the complaint; that is, setting forth particular facts which show that some one or more allegations of the complaint are not true. They are like special pleas in the nature of the general issue, under the old system of practice. The present case we consider one of that kind. One material allegation in the complaint is that the plaintiffs, at the time of the alleged entry of the defendants, were the owners and in possession of the mining claim sued for; and another is that the ownership and right of possession remained in the plaintiffs up to the commencement of the action. The defendants deny these allegations in direct and positive terms, and then proceed and amplify those denials by alleging facts of previous abandonment and forfeiture, which, if true, would sustain the general denial. The material and issuable fact was, not that the plaintiffs, months or years before, were the owners and in the possession of the claim, but that such was the case at the time of the entry of defendants; and even if the specific facts of abandonment and forfeiture had not been set forth in the answer, the defendants clearly had a right to prove them, in support of the general denial in their answer. It may be that the defendants were not justified in saying that the plaintiffs never had been the owners or in the possession of the claim, yet it might still be true that they were not the owners or in the possession at the time of the entry by defendants. Because they were mistaken as to an immaterial fact, they should not be precluded from proving the material fact in issue, by any legal evidence supporting their denial. The proof of abandonment and forfeiture of the property by the plaintiffs, prior and up to the time of the entry, was direct evidence in support of the general denial. We can not see

how the plaintiff was injured by having these facts fully set forth in the answer. It advised him of the character of defendants' proof upon the main point in issue, and to that extent it was a benefit to them. The court erred in compelling the party to elect, and in excluding the evidence of abandonment and forfeiture.

The judgment is therefore reversed, and the cause remanded for further proceedings.

COLMAN ET AL. V. CLEMENTS ET AL.

(23 California, 245. Supreme Court, 1863.)

Customs proved though not pleaded. In a suit in ejectment for a mining claim, proof of the mining rules and customs which tends to support the plaintiff's title may be given in evidence though such rules and customs are not pleaded.

[1]**Adverse possession by tenants in common.** An instruction that the possession of one tenant is the possession of his co-tenants only so long as the tenant in possession recognizes the co-tenants, was properly refused because the mere refusal to recognize the co-tenant does not constitute an adverse possession.

Parol and written proof of mining rules. A motion to strike out parol proof of mining customs was properly refused when it appeared that the written rules afterward proved were of doubtful force at the time they were sought to be applied to the facts of the case. There was no impropriety in leaving both the parol and written evidence to the jury.

[2]**Mining rule construed—Forfeiture.** The word "claim" in the following mining rule—"There shall be one day's work done on each claim every thirty days from the first of May until the first of December in each year," construed to include all kinds of claims, joint as well as separate, and the rule applied, that parties claiming forfeiture under the law must show that the case comes within the strict letter of the rule.

Parties. In a suit in ejectment for a fraction of a mining claim by some of the original locators against the others who have joined with strangers in relocating the claim, it is not necessary that all of the relocators should be made parties to the suit.

Appeal from the District Court of Calaveras County, Sixteenth Judicial District.

TOD ROBINSON, for appellants.

[1] *Hebrard* v. *Jefferson Co.*, 5 M. R. 270.

[2] *Belcher Co.* v. *Deferrari*, 62 Cal. 160; *Mt. Diablo Co.* v. *Callison*, 5 Saw. 439; *Post* LODE.

COFFROTH & SPAULDING, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action brought by four plaintiffs against eight defendants to recover the possession of the undivided five thirtieths of a mining claim in Calaveras county. It appears that about the fifth of February, 1861, one Samuel Colman, with two others, took up and marked out 4,500 feet of a copper claim in the name of themselves and others, amounting to thirty persons in all. These names included the present plaintiffs and defendants. Some of these names were included without the previous knowledge or consent of the parties. Colman afterward sold out his interest to one of the plaintiffs, William Colman. Afterward, some time about the first of June, 1861, twenty-three of the persons named in the original location, with seven others, formed a new company and relocated the same ground in their own names, and have continued in possession ever since, claiming that the original location had been abandoned by failure, on the part of those left out of the new organization, to perform the work required by the mining rules and customs. Only eight out of the thirty new locators are made defendants, and these eight were among the number named in the original location. The case was tried by a jury, who found for the plaintiffs, and a judgment was rendered accordingly, from which the defendants appeal.

On the trial, the plaintiffs offered to prove the mining laws and customs, to which the defendants objected that they had not been mentioned or set forth in the pleadings, and could not, therefore, be proved. The complaint alleges, in general terms, that the plaintiffs are the owners of the undivided five thirtieths of the mining ground in controversy, which is denied in general terms by the answer. So far as the title of the plaintiffs depended upon mining rules and customs, or acts done in pursuance thereof, such proof tended to support such title, and it was not necessary to set forth such mining rules and customs in the pleadings. The court below did not therefore err in overruling this objection of the defendants.

On the trial, the court instructed the jury that the posses-

sion of one locator was the possession of all, and the defendants then asked that the following instructions be given: "That the possession of one tenant is the possession of his co-tenants only so long as the tenant in possession recognizes the co-tenants," which the court refused to give, and this is assigned as error. The possession of one tenant in common is presumed to be the possession of all. But such possession may in fact be adverse to that of the co-tenant. The instruction asked for is founded upon the idea that the mere fact that the tenant in possession does not "recognize the co-tenant" constitutes an adverse possession; and the case of *Humbert* v. *Trinity Church*, 24 Wend. 577, is cited in support of the position. An examination of the able opinion of Justice COWEN, in that case, shows that more is required than is stated in the instructions asked for. He holds that the possession of the tenant must be with the intent to hold adversely, and it must appear that such intent has been "indicated by acts calculated to exclude the complainants from all participation as tenants in common." In the case of *Northrop* v. *Wright*, 24 Wend. 221, it was held that a possession by a tenant in common for twenty-seven years, during which he had not recognized the right of his co-tenant, was not sufficient to presume an ouster. There was, therefore, no error in refusing to give the instruction in the peculiar form in which it was worded.

Parol evidence has been given of the mining laws and customs. The written laws were afterward introduced, and the defendants then moved to strike out the parol proof, which was refused by the court, and this is assigned as error. When the parol evidence was offered, no objection was made that these mining laws were in writing or that the latter was the better evidence, and it is doubtful, therefore, whether the case does not come within the rule laid down in *Kiler* v. *Kimbal*, 10 Cal. 267. But it seems there was some question as to whether these written laws were in force at the time when they were sought to be applied to the facts in the case. There was, therefore, no impropriety in leaving both the parol and written evidence to the jury.

One of these mining laws was as follows: "There shall be one day's work done on each claim every thirty days from the

first of May until the first of December in each year." The defendants asked the court to instruct the jury as follows: "That under the mining laws in evidence, it was necessary for one day's work to be done every thirty days after May until December, for each individual claim, and not one day's work for a company's claim, in order to avoid the presumption of abandonment," which was refused by the court, and this is assigned as error. The claim in this case is a joint one, that is, four thousand five hundred feet located in the joint names of thirty persons. No location was made of any particular portion of four thousand five hundred feet to any one locator, and it would therefore be impossible for each locator to do his day's work upon his own claim, if this section of the mining laws is to be construed as applying solely to each individual locator. The word "claim" is used, which is general in its character, and properly includes all kinds of claims, joint, as well as separate. If it had been intended to include, or apply only to the claim of each locator, whether made jointly with others, or separately to himself alone, it should have been expressed in clear terms. As the parties claim a forfeiture under it, it is to be strictly construed against the claim of forfeiture. In others words, the parties who claim a forfeiture under it, must show that the case comes within the strict letter of the rule: *Von Schmidt* v. *Huntington*, 1 Cal. 70; *Waring* v. *Crow*, 11 Id. 366. This point is therefore overruled.

It is objected that all the co-tenants should have been made parties, that the adjudication is incomplete, and that the judgment can not be enforced without them. We can readily see that difficulties may arise about the enforcement of the judgment, and that it would have been more advantageous to have made all the co-tenants parties; but it can hardly be deemed essential in cases of this kind, or that a judgment of this kind is erroneous because they are not all brought in: *Waring* v. *Crow*, 11 Cal. 366. If the action had been against them as a mining partnership, in the nature of a suit in equity, it would have been necessary to have made all persons interested in the claim or the subject-matter parties, and no judgment could have been properly rendered until they had all been made parties: 1 Daniel's Ch. Pr., 315–318; Story's Eq. P.., Secs. 166–168.

We have thus disposed of all the material points raised by the defendants, and find no error prejudicial to the appellants in the action of the court below.

The judgment is therefore affirmed.

See *Dutch Flat Water Co.* v. *Mooney*, 12 Cal. 534; *Post* FORFEITURE.

DEPUY ET AL. v. WILLIAMS ET AL.

(26 California, 310. Supreme Court, 1864.)

[1] **Abandonment—District rules.** The failure to perform the amount of work on a mining claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another.

Idem—Collusion. Where upon a question of abandonment, the plaintiffs offered to show that defendants went into possession of the mining ground by collusion with one of the plaintiffs: *Held*, that the evidence upon such naked offer was well excluded; *aliter* if offered with evidence showing the agreement of such plaintiff with his fellows to hold the claim for them, or on their account.

[2] **The complaint in ejectment** should not state the evidence, but only the ultimate facts constituting the cause of action.

Ouster—Force—Fraud. If a party had the right of entry upon a mining claim, his right is not vitiated by his forcible or fraudulent exercise of such right, and the party whom he ousted can not be restored by ejectment.

Testimony irrelevant at the time offered. A decision of the court refusing to admit certain testimony, which was correct at the time of such refusal, will not be reversed because testimony subsequently introduced rendered the offered testimony material.

Appeal from the District Court of Calaveras County, Sixteenth Judicial District.

This action was commenced May 18, 1863. The complaint charges the ouster to have taken place February 28, 1863. The property sued for was a mineral lode, alleged to contain gold, silver and copper, eighteen hundred feet in length.

The mining laws of the district required a claim to be worked one day in thirty, from May 1st to November 1st of each year. Defendants set forth in their answer a copy of

[1] *Original Co.* v. *Williams Co.*, 60 Cal. 631.

[2] *Sullivan* v. *Iron Silver Co.*, 109 U. S. 550.

the mining laws, and plaintiffs also introduced a witness by whom they were proven. Defendants entered after plaintiffs had failed to fulfill this clause in the laws.

The other facts are stated in the opinion of the court.

CALEB DORSEY and H. P. BARBER, for appellants.

By the Court, RHODES, J.:

Ejectment to recover a mining claim. The plaintiffs were in the actual possession up to about August, 1862. The defendants were in possession at the commencement of the action, and for their defense they rely mainly on the ground that the plaintiffs, before the entry of the defendants, abandoned the mining claim by failing to work it, according to the local mining laws. The court below ordered a nonsuit of the plaintiffs on that ground.

The plaintiffs' counsel does not controvert the view of the court below, that a failure to perform the amount of work on the mining claim that is required by the local mining laws or regulations, amounts to an abandonment of the claim, and that thereupon the claim may be occupied and appropriated by another. But he relies upon a single point for the reversal of the judgment, which is the refusal of the court to permit him to prove "that plaintiff Milton colluded with the defendants to get possession of the claim in dispute, and that it was by such collusion that defendants got into possession of plaintiffs' claim." The respondents objected to the evidence on the grounds, "1st, That the same parties can not be shown to be plaintiffs and defendants in the same action; and 2d, That it is irrelevant and inadmissible under the pleadings, as the complaint charges no collusion between plaintiffs and defendant." If a plaintiff has in fact sued himself, we think it would be reasonable and proper, though we find no direct authority to the point, that he should be permitted to prove that he fills two of what Blackstone defines as the constituent parts of a court—the *actor* and *reus*—for the purpose, if for no other, of satisfying the third constituent part of the court—the *judex*—of a fact that would not be credited without the most ample proof. But, be this as it may, the objection is not relevant to the evidence offered. The

learned judge of the court below was in error in sustaining the objection on the second ground, for it was not requisite that the fact of collusion should have been alleged in the complaint, to entitle it to be proven. If it had been alleged the complaint would have been liable to the objection that it stated the evidence, instead of the ultimate facts of the cause of action. We can add nothing to the lucid opinion of Mr. Chief Justice FIELD, in *Payne* v. *Treadwell*, 16 Cal. 242, that will serve more clearly to point out the allegations that are necessary in an action of ejectment.

But the decision excluding the evidence may be sustained on other grounds. A party who has a right of entry upon lands, and who has entered by force or fraud, can not be turned out of possession by the action of ejectment. If he possesses the right of entry, it is not impaired by any fraud, false representation or collusion practiced by him upon one having no right of possession, and so, if he is rightfully in possession, he will not be put out of possession, though he may have gained an entry by any species of collusion. The *wrongful* entry and the *wrongful* withholding of the possession is, in ejectment, nothing more than the entry upon the possession of the plaintiff and the withholding the possession from him without lawful right so to do. They are not made, in a legal sense, any more wrongful in an action of ejectment, by superadding to them fraud or collusion. If the defendant has no right to the possession, as against the plaintiff, the plaintiff's cause of action is not, in the least degree, strengthened by proof of the fraudulent acts of the defendant in acquiring the possession. He may safely rest upon proof of his legal title to the possession, and the fraud or collusion of the defendant is immaterial. It is quite unusual, and we think unsustained by principle or authority, for a number of plaintiffs to found their claim to relief upon the fact that one of their number had combined and colluded with others to defraud his co-plaintiffs. An action founded upon such a state of facts could not be maintained by a party to the fraud, except in violation of the maxim of universal application, that a party can not take advantage of his own fraud.

If Milton occupied such a relation to the claim, by agreement with his co-tenants, that he could by his acts or neglect

divest them of the right of possession, then it might be material to inquire into his acts of fraudulent collusion with the defendants, by which an apparent abandonment of the claim resulted, for the purpose of showing that they had not voluntarily, or in fact, abandoned the claim.

At the time plaintiffs offered to prove that Milton colluded with the defendants that they might get possession of the claim, no evidence had been offered tending to prove that any arrangement or agreement had been made between Milton and the other plaintiffs by which he was to hold the claim, or do any act for them or on their account, nor did they propose to prove in connection with the testimony then offered that any such arrangement or agreement had been made. Unless such proof had been made, or was proposed to be made, the fact of the collusion of Milton with the defendants was immaterial, and the ruling of the court was correct. The decision of the court being correct at the time it was made, proof subsequently made, completely establishing an agreement by which Milton was to hold the possession of the claim for the plaintiffs, and perform the necessary amount of work, and do all the acts that were requisite under the mining laws, to enable them to continue to hold and own the claims, would not have the effect of rendering the decision erroneous. The decision was right when given, and therefore will be sustained on appeal.

Judgment affirmed.

BULLION MINING CO., Respondent, v. THE CRŒSUS GOLD AND SILVER MINING CO., Appellant.

(2 Nevada, 168. Supreme Court, 1866.)

Practice—Defendant substituted for plaintiff. If one of several defendants in a suit in ejectment buy the plaintiff's claim, the controversy as to such defendant is ended, and he may properly be substituted for the plaintiff in prosecuting the suit against the remaining defendants.

[1] **Amendment to complaint.** In such a case the new plaintiff can not so amend his complaint as to include other property than that originally sued for, and which he claimed by a different title.

[1] *Givens* v. *Wheeler*, 6 Colo. 149.

Statute of Limitations as a defense to the amendment. The fact that the right of action for such additional ground has been barred by the Statute of Limitations since the commencement of the original suit, is a further reason for refusing to allow such amendment. It would mix up two causes of action and embarrass the defense.

Judgment for undivided fraction of claim—Duty of sheriff. Where one of several tenants in common sues in ejectment for an undivided fraction of a claim and recovers, the law does not authorize the sheriff in entirely expelling the defendants from possession if they are willing to quietly submit to a joint occupancy by the plaintiff with themselves.

Tenants in common may sue jointly. All the tenants in common of an estate may unite in one action, under the California statute, for the possession of the common property, or one tenant may sue for his undivided fraction, but it has never been decided that more than one and less than all can unite in such action.

Recovery of blind lode without surface. Where suit is brought for a blind lode bounded by walls not found till the depth of about two hundred feet is reached, the lode or ledge only can be recovered, and no part of the surface.

Recovery of lode with surface. Where a miner locates a portion of the surface, and also a lode with its dips, angles and spurs, he may have his common law judgment for the surface, and judgment also for the lode following its course under other public lands.

Outcropping lode. Where a ledge located as such comes to the surface, locator may recover the surface provided the outline of the ledge is visible on the surface.

Common law doctrine modified. The common law doctrine that he who possesses the surface owns to the center of the earth, is greatly modified as to the rights of miners and others on the public lands. One party may be entitled to occupy the surface, and another the mineral veins running under the same land.

Recovery of lode without its hoisting works—Severance. The fact that plaintiff recovered a vein or lode gives him no right to hoisting works erected for the purpose of taking ore from that vein, unless he had also recovered the surface on which such hoisting works were erected.

Appeal from a judgment rendered in the District Court of the First Judicial District, Storey County, the Hon. RICHARD RISING, presiding.

CHARLES E. DE LONG, for appellant.

WILLIAMS & BIXLER, for respondent.

By the Court, BEATTY, J.:

On the 20th of November, 1863, Theodore Winters and some seven others, plaintiffs, filed a complaint against the

Fairview M. Co., the Crœsus M. Co., the Bullion M. Co., the Minerva M. Co., the Superior M. Co., the Alpha M. Co., and the Four-Twenty M. Co., seeking to recover an interest in a certain mining claim, consisting of an "equal undivided eight hundred and seventy-five feet" in a claim described as "The Cosser & Co.'s claim." * * * * * * "Beginning on that certain gold and silver-bearing quartz ledge in said district called the Comstock ledge, at the southern boundary of the claim formerly called the Webb and Kirby, and now known as the Chollar claim, and extending thence south along and following said Comstock ledge, with all its dips, spurs and angles, a distance of 1,600 feet, * * and extending on each side of said ledge 100 feet."

The present appellant first demurred to this complaint, and, on the demurrer being overruled, answered, and then, by leave of the court, put in a supplementary answer by way of amendment to the original answer.

Most, if not all the other companies sued have put in some defense; but their answers are not material, as it regards the determination of the points before us.

No action is shown by the record to have been taken in the case after the answers filed, until the evening of the 12th of May, 1865, when a part of the defendants were served with notice, affidavit, copy of amended complaint, etc.

The notice was to the effect that the plaintiffs, next morning at ten o'clock, would move the court to dismiss the complaint as to the defendant, the Bullion company, make an order allowing the Bullion company to be substituted as plaintiff, and also allowing an amended complaint to be filed by the Bullion company.

At ten o'clock, those defendants who had been served with notice came into court and protested against the hearing, on the ground that the notice was insufficient, and appealed to a rule of the court requiring five days' notice of motions of this character.

The judge observed from the bench he would shorten the notice, and ordered the motion to be heard at two o'clock that day. At two o'clock the motion was heard and sustained.

After the order was made as above stated, a notice was then served on the present appellant that the court would be asked

to make the orders, which, in fact, had already been made. The bill of exceptions says this notice was served on the appellant on the afternoon of the 16th of May. This date is evidently a mistake, because it is inconsistent with other statements in the same bill of exceptions.

It must have been served on the appellant after the 13th and before the 16th, probably on the afternoon of the 15th. At the opening of the court on the 16th the motion was called up and sustained. This was in effect only ordering that the appellant should be bound by the order which had already been made upon notice to other defendants.

The appellant protested against the whole proceeding as irregular, and calculated to deprive it of a fair opportunity of defending its rights in the case, and excepted to the ruling of the court.

The court ordered appellant to file its answer to amended complaint the next morning (the 17th of May), although they had never been served with copy thereof. On that morning the answer was filed, and the trial of the cause proceeded.

The amended complaint is not for an undivided interest of 875 out of 1,600 feet, but for the entire claim known as the "Cosser claim," more particularly described as follows: "Sixteen hundred feet in length upon that certain quartz lode known as the Comstock lode, being the section of said lode bounded on the north by the claim of the Chollar Silver Mining Company, and extending southerly along said lode, and including all the dips, spurs and angles thereof, a distance of 1,600 feet of the said lode, being bounded upon the west by a wall of dark green rock, which appears in the working shaft of the Bullion Mining Company, at a depth of about 460 feet, and in the working shaft of the Chollar company at a depth of about 425 feet, having a dip to the east of from thirty to fifty degrees, and running in a general north and south course, and bounded upon the east by a heavy seam of clay selvage which appears at the lower works of the said companies, and lies along the country rock which forms the eastern wall of said lode."

The case went to trial on this amended complaint. The jury found for plaintiff, and judgment was rendered for restitution of the property as described in this amended com-

plaint. After judgment an execution was issued, and the sheriff put plaintiff in possession of certain hoisting works of the appellant. The appellant contending that the judgment did not embrace these hoisting works, moved the court for an order to re-instate it in possession of said works. This the court refused. Appellant appeals from the judgment, and also from the order refusing to re-instate it in possession of the hoisting works.

We think both appeals must be sustained. The original complaint was for only 875 out of 1,600 feet, or for an undivided interest of thirty-five sixty-fourths of the whole. This is all the original plaintiffs claimed.

If these plaintiffs sold out to the Bullion company, doubtless it would have been proper to substitute that company as plaintiff, and allow it to conduct the suit in its own way. We do not see that the fact that the Bullion company had originally been a defendant could make any difference. Here was a suit for mining ground which seems to have extended over the claims of several companies. If one of these companies, sooner than litigate the suit, chooses to buy plaintiff's claim, it had a right to do so. When that was done, the controversy was settled as to those parties. But in such a case it would not be improper to allow the suit to continue as to the other defendants. But if continued, it must be the same suit, and not a new one. It must be for the property claimed by the original plaintiffs, and not for that property and other property claimed by the new plaintiff, united by a new declaration to that which was originally sued for.

If A were to sue B for a horse, and then assign the cause of action to C, C could not amend his complaint and charge that B had taken the horse from A, his assignor, and taken a yoke of oxen from C, the present plaintiff. Every one would at once see that this was uniting a new and distinct cause of action, arising to C alone, with the original cause of action which arose to A. To allow this jumbling together of new and distinct causes of action, originally pertaining to different parties, would lead to much confusion and to no good. We have seen no precedent for such a practice, and can not believe it justifiable. In this particular case, the

reasons for refusing to sustain such a course are still stronger than in the case supposed.

A Statute of Limitations was passed in the latter part of November, 1861, to take effect December 2, 1861, which limited all actions for the recovery of mining claims to two years after cause of action arose, but said statute not to begin to run against causes of action already existing until after its passage. When the first suit was brought, the statute had not run in any case, and could not be pleaded. This thirty-five sixty-fourths of the 1,600 feet was by the bringing of this suit protected from the running of the statute. But in a few days after the bringing of this suit, the right to sue for the remaining twenty-nine sixty-fourths of this claim may have been barred by the Statute of Limitations.

The appellant claims that such was the case. It certainly had the legal right to try to establish such a defense. It was not good practice to thus mix up two causes of action so as to prevent or embarrass such a defense. We mention this as an illustration of one of the many evils resulting from such a practice. If such a practice were allowed, all a plaintiff, who finds himself about to be defeated, has to do to throw the costs on a defendant, is to assign his cause of action to some one who has a good cause of action against the defendant, and let the new party be substituted, and unite a new cause of action, which he can sustain, to the old one, which can not be supported, and thus mulct the defendant in all the costs. Such a practice is without precedent, unjust, and not to be tolerated.

No doubt when a new plaintiff is substituted, he may, like any other plaintiff, amend his complaint, in a proper case, as to mere matter of form, provided it is substantially the same cause of action as that originally set out. The respondent claims that such was the case here; that, although the original complaint was only for an undivided interest of 875 out of 1,600 feet, still, if a judgment had been had under that complaint, the plaintiffs would have been entitled to possession of the whole 1,600 against the appellant, a mere trespasser.

Upon this point respondent cites several California cases.

Some of those cases establish this proposition, that where a plaintiff sues for a tract of land claiming that he is entitled to the sole possession thereof, and shows on the trial that he is a tenant in common with others in the land, and that he and his co-tenants are entitled to the exclusive possession of the property described, he will be entitled to recover the entire tract against trespassers who hold adversely to him and his co-tenants. These California cases all seem to be based on the authority of a case in Day's Reports, to which we have no access. Whether they are sound or not (of which, possibly, there is some doubt) we have not thought it necessary to inquire. That is not this case. Here the whole possession was *not* sued for. The judgment could be for no more than was claimed. If the plaintiffs had obtained judgment for thirty-five sixty-fourths, we know of no law which would have justified the sheriff in entirely expelling defendants from possession if they had quietly submitted to a common or joint occupancy by the plaintiff with themselves. We have certainly been referred to no authority on this point, and with our present light must hold such a recovery would only have entitled plaintiff to a common possession with defendants, and those owning the other twenty-nine sixty-fourths might become barred before the trial of the first suit.

For these reasons, we think the amendment should not have been allowed, and that the judgment rendered on that amended complaint is erroneous and must be set aside. If the Bullion company can recover anything in this case, it can only be the thirty-five sixty-fourths sued for in the original action. This court has ruled that *all* the tenants in common of an estate may unite in one action under our statute for the possession of the common property. It is not disputed one tenant in common may sue for his undivided fraction. But this court has never decided, as counsel for respondent seem to think, that more than one and less than all the tenants in common of a piece of land may unite in such action.

This point being one of much difficulty and doubt, we have not thought it necessary to decide, as this case must be reversed on other grounds. In this case the appellants complain, and we think not without just ground, of precipitancy

and haste in making the order for change of parties, time for filing answer, etc. But, as the judgment is reversed on other grounds, it does not seem necessary to decide whether this undue haste and compulsion on the part of defendants to answer a new complaint, without time for reflection or consideration, would of itself have been sufficient to set aside the judgment.

The action of the sheriff in putting the plaintiff in possession of the appellant's hoisting works, was a clear and unmistakable trespass. The complaint on which the suit was tried describes nothing on the surface. It describes a *lode* (a Cornish word nearly synonymous with vein), bounded by certain rocks which are found, if we may believe the complaint, only at the depth of several hundred feet below the surface. When found at that depth, they are pitching, says the complaint, to the east at an angle of thirty to fifty degrees. Now, if these rocks are the boundaries of the claim sued for, and the rocks come no nearer the surface than two or three hundred feet, then the vein comes no nearer than two or three hundred feet. For the vein or lode is the matter contained between those two walls; where the walls terminate, there the veins terminate—unless there should be a solid ledge arising from the vein, which supports itself without walls. But counsel for respondent seems to think that in an ejectment plaintiff must recover from the surface of the earth downward. They seem to think it would be impossible to recover a vein without recovering the surface over the vein. At common law the recovery in actions of ejectment and all real actions, was usually for a portion of the earth's body or substance, somewhat in the form of an inverted cone or pyramid, the surface of the earth recovered being the base of the figure, and the apex at the center of the earth. But the judgment rendered for a ledge, lode or vein is quite different. It may include a portion of the earth's surface, where that surface has been properly located.

The plaintiff would, in case of a surface location, together with the lode following its dips, spurs, and angles, then be entitled to his pyramid carved out of the earth's body, having its base on the surface and its apex at the center of the earth. But if the lode dipped out of this pyramid, as they nearly

always do, he could also have his judgment following this lode (usually in the form of a solid parallelogram), wheresoever it might go—at least as far as it might extend under the public lands. But if a party locates a ledge without any location on the surface, he can only recover the ledge.

If the ledge comes to the surface, as is frequently the case, undoubtedly he is entitled to the surface. But that could only be where the outlines of the ledge are visible on the surface.

It will probably be suggested that if a party locating a ledge does not get any of the surface, he can not get to his ledge, and the location will be valueless. This, we think, is rather an imaginary than a real difficulty. Nearly all ledges diverge more or less from the perpendicular. The owner has the opportunity of working them from a great many different points. There would generally be no difficulty in finding some accessible point from which the vein might be reached that is not occupied. If all such points are occupied, then he must, like anybody else, buy what he wants.

If we were to hold that a party locating a blind ledge (one which does not show itself on the surface) must have a certain portion of the surface to work his ledge, where are we to give it to him? Nearly all ledges diverge more or less from the perpendicular. Frequently neither a ledge nor the wall rock inclosing veins or lodes reaches to the surface by many feet—sometimes by many hundred feet. Now, if we are to extend such veins to the surface, where no particular surface ground has been located, what rule are we follow?

If the walls are first found at a depth of two hundred feet below the surface, and at that depth have a dip of forty-five degrees, shall we ascend from the top of the wall rock by perpendicular lines to the surface, and give the ground included between those lines thus produced to the holder of the ledge, or are we to extend imaginary lines from the top of the wall rock to the surface at an angle of forty-five degrees, and give to the ledge-holder the ground between those two lines? It is evident there would be a difference of two hundred feet in the location of the two pieces of ground. To adopt either rule would be to endanger the improvements

of others who might erect buildings in ignorance of the true location of the ledge. Sometimes ledges change their dip. At one time they may lie nearly flat, at another they may be nearly perpendicular. Sometimes the same ledge, as is claimed in this place, may dip to the west; then, at a certain depth, change and dip to the east. It would be impossible to adopt any sensible and practicable rule for extending to the surface the location of ledges or lodes that are located merely by name as extensions of known or marked ledges, where those locations show no croppings or indications on the surface. It is as necessary in every mining locality to have houses for boarding in, mechanics' and traders' shops, etc., as it is to have mines. They are as worthy of protection as the mines themselves. We can not adopt any rule that will sacrifice the houses and shops of one class of citizens to promote the interest of another.

Whilst we depart from the rules of the common law so far as to let the miner follow his lode of quartz wheresoever it may go, even though it runs under public land which was in the occupancy of another before the mine was located, on the other hand, the occupier of the surface is equally entitled to protection in the use of that surface, if a miner having a senior location should in the course of time be found to run under his improvements. The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this State. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will doubtless lead to many complications. To adhere to the common law rules on this subject is simply impossible. To attempt to carry out common law doctrines on this point would either give all the houses in Virginia to the mining corporations, or else all the most valuable mines to those occupying the houses. The well-established custom of miners to locate veins of mineral, claiming to follow them with all dips, spurs and angles, without reference to occupancy of the surface, has compelled a departure from common law rules.

In this particular case a shaft, sunk in the hoisting works

which are the subject of controversy, penetrates the eastern wall rock, passes through it, and reaches the vein at the depth of about two hundred and fifty to two hundred and fifty-five feet. At this point the vein is dipping to the east at an angle of forty-five degrees. The eastern wall rock is of course pointing toward a spot on the surface (supposing the ground to be level) some two hundred and fifty feet west of the disputed property. Consequently, if the wall were continued, the most easterly portion of the vein would be over two hundred feet west of the hoisting works. If the eastern wall breaks off at any point above or west of where the shaft is sunk, whether a shorter or longer distance, the hoisting works are still, in any event, east of that portion of the land lying perpendicularly over the vein where it comes nearest the surface.

But, say respondents, the vein, where it gets to within two hundred feet of the surface, changes, and has a downward dip to the west instead of to the east, as it does at a depth of two hundred and fifty feet. That seems to be the general theory among miners in regard to the Comstock lode. But there is no evidence that such is the case at this particular point of the vein. There is no evidence here of wall rocks appoaching the surface nearer than two hundred and fifty feet of the surface. The only croppings of the ledge spoken of in the testimony are eight hundred feet from the hoisting works.

The surface of the ground on which these works are situated is not described in the complaint, the judgment, or execution.

The sheriff had no right to meddle with these works, because the plaintiff's lawyers, witnesses, or somebody else, supposed that if certain wall rocks run where, according to their theory, they ought to run, this piece of land would be within those walls.

Respondent makes an argument to prove that hoisting works are a part of the freehold on which they stand; that these hoisting works were erected especially to work this mine or lode, and therefore appurtenant to the mine, and must go with it. That the hoisting works belong to the realty and must go with the land on which they stand, we certainly believe to be a correct proposition. If the plaintiff was entitled to recover the land on which they stand, then it was entitled to have

the works; if it could not recover the land it could not recover the works. How the intention with which the works were erected could influence the plaintiff's right to recover the land on which they stand, we are at a loss to comprehend.

If plaintiff is entitled to recover these hoisting works because they were erected to hoist ores from this mine, it would upon the same principle be entitled to recover an assay office in Virginia City, or any other place in Storey county, if one was erected there to assay ore from this mine. The object for which the works were erected has nothing to do with the question as to who is entitled to the ground on which they stand.

The judgment of the court below must be reversed. The plaintiff will be allowed either to dismiss its action, or to move the court to re-instate the pleadings as they stood before the order was made allowing the amended complaint to be filed.

The court will also make an order directing the sheriff to re-instate the appellant in possession of the hoisting works from which it was ejected.

RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, J., LEWIS, C. J., concurring.

The first point made by respondents in their petition for rehearing is, that this court erred in supposing that the original suit was only for eight hundred and seventy-five feet of ground, and not for sixteen hundred feet. After a careful examination of the original complaint, it still seems apparent to us the suit was for only eight hundred and seventy-five feet.

The complaint avers substantially that plaintiffs and their predecessors were in 1859 the owners of, and in the possession of, eight hundred and seventy-five feet undivided interest in a certain mining claim called the Cosser claim, which claim is more particularly described (here follows the description of a claim of 1,600 feet); that subsequently defendants entered on said claim and ousted plaintiffs therefrom, and then winds

up with a prayer for the possession of the "mining grounds aforesaid."

The "mining grounds aforesaid" might mean those of which plaintiffs had been in possession, to wit, eight hundred and seventy-five feet, or it might mean the whole sixteen hundred feet. But the gist of the complaint, the very wrong complained of, is that the defendants ousted plaintiffs; ousted of what? Why, doubtless, of eight hundred and seventy-five feet, in possession of which the plaintiffs had been.

There is no allegation in the complaint that plaintiffs were ever in possession of more than eight hundred and seventy-five feet, or that they ever had the right of possession to more.

One tenant in common may be in possession of the entire common property. If in such case he be ousted by a trespasser who is a stranger to the title, we see no reason why, upon a proper complaint, he may not recover the entire premises from the trespasser.

But if he wishes to recover the whole, he must allege his possession of the whole and ouster therefrom, or other facts clearly showing his intention to sue for the whole, and his right to such recovery.

Here there was nothing of the kind; and under the original complaint no recovery exceeding eight hundred and seventy-five feet could have been had. Then, to amend the complaint so as to seek to recover sixteen hundred feet, was so to amend it as to introduce a new cause of action.

But, argues respondent, even if it was introducing a new element into the suit, and the court below erred in so allowing, this error should be disregarded unless it produced, or reasonably might have produced, some detriment to the other side. And in connection with this proposition, petitioner asserts two secondary propositions: first, that if the action as to seven hundred and twenty-five feet was barred by the Statute of Limitations, that statute could have been pleaded to this part of the action embracing the seven hundred and twenty-five feet as readily as if there had been a separate action therefor; and secondly, that no such plea could have been successfully introduced in this case, even if a separate action had been brought for the seven hundred and twenty-five feet.

To the first of these secondary propositions we say, the law may be as stated by counsel. Possibly, if defendants had been allowed time, their counsel might have found an authority for interposing the plea of the Statute of Limitations as to seven hundred and twenty-five feet. Yet it must be admitted that it is a complicated and not well settled question. The circumstances of this case, as far as shown in the record, indicate that if a separate action for the seven hundred and twenty-five feet had been brought, that plea might have been successfully interposed. Hurried as counsel for defendants were in this case into their defense, they failed to interpose that plea, and a recovery is had against them, which probably never could have been had under more regular proceedings.

This court can not sanction such irregular, unprecedented and dangerous practices merely because there is a possibility that counsel on the other side may by great astuteness and readiness be able to ward off threatened dangers. The proceedings in courts of justice should be as much simplified and as little complicated as possible. Such a practice as was indulged in in this case must inevitably lead to confusion, complication, uncertainty and injustice.

As to the other proposition, that the Statute of Limitations could not have been successfully interposed in this case, we confess that we are totally at a loss to comprehend the reasoning of the counsel.

Counsel state that the original plaintiffs, Winters and others, claimed under the Cosser title; that the defendants claimed under the Buchanan & Smith location; that the possession of one tenant in common inures to the benefit of all his co-tenants, etc.; and asks: "If Winters and others were in the actual possession in the proportion of eight hundred and seventy-five to one thousand six hundred undivided of each and every inch of the ground, how is it possible for the Crœsus company to have been at the same time in the actual peaceable possession of any part of it under an adverse title?" * * *

"If Winters and associates were in possession as alleged, and as found by the jury, of the premises in dispute, that possession was good for the other owners—unless adverse to them, of which there is no pretense—and would inure to

their benefit. As long as Winters and associates so remained in possession there could be no ground for a plea of the statute by the defendants against their co-tenants."

From this language one would suppose that Winters and other plaintiffs had always been in possession of eight hundred and seventy-five feet of ground sued for.

But the plaintiffs' complaint only avers that they were in possession in June, 1859, and remained in possession until ousted by defendant on the—day of——, 1863. The amended complaint was filed in May, 1865.

Now, if the ouster took place in the early part of May, 1863, or prior to that time, then Winters and his co-plaintiffs had not been in possession of the eight hundred and seventy-five feet for more than two years and there was no reason why the statute should not have run against the seven hundred and twenty-five feet.

Taking the original complaint as literally true, it does not negative the idea that the ouster was prior to May, 1863. But it is not unusual for lawyers to allege the ouster to have taken place just before the suit is brought, although, in fact, it may have been several years previous.

Whilst we have nothing positive in the record showing when the ouster did take place, if indeed there ever was an ouster, the facts that much work had been done and valuable improvements put on defendants' claim would indicate that the ouster, if any, took place several years prior to November, 1863, when the original suit was brought. Certainly, the finding of the jury did not prove that Winters and his co-plaintiffs were in possession of eight hundred and seventy-five feet when they brought their action. If they were, we do not comprehend why they brought suit.

The next point which the petitioners seek to have reviewed is our decision as to the hoisting works. Petitioners urge that the hoisting works were between the walls of the vein, and attempt to show it in this way: They say the shaft connected with the hoisting works is entirely in *vein matter* from the top down, as shown by Mason, a witness for the defendants, and then put their argument in this form:

"Every vein must necessarily have, and has, two walls, and all matter embraced within those walls and denominated 'vein matter,' is a part of the vein. The hoisting house and machinery were upon, and the entire shaft in, vein matter. Therefore, they were between the walls of the vein or ledge."

By the same process of reasoning, it may be proved that a man is a horse. Every man is an animal, and every horse is an animal; therefore, every man is a horse.

Admitting that every vein has outside walls, that all matter between those walls is vein matter, it certainly does not prove that all *vein matter* is contained between two walls. Vein matter may certainly be removed from between its original walls either by artificial or natural means, and after such removal it does not cease to be vein matter. When we say that certain substances are vein matter, we may mean that those substances are now a component part of some mineral vein, or that at some past time they did constitute a part of the substance of some vein. It is well known that what miners call *vein* matter frequently rolls down a mountain side to a great distance from its original location in the vein. By the action of water it is carried to still greater distances. The hoisting works in this case were on the side of a mountain.

They may have been on vein matter which had rolled down the mountain for an indefinite distance. There is certainly no satisfactory evidence to show those works were within the walls of the ledge sued for, and, therefore, the sheriff, under a judgment for a quartz ledge, had no right to interfere with those works.

The fact that the original complaint sues for the ledge and two hundred feet on each side of it can make no difference. The case was not tried on that complaint; therefore, the first complaint has nothing to do with the question. This court only decided the sheriff had no right under that particular judgment, to interfere with defendants' hoisting works. It did not decide what would be the effect of a judgment for the lode and two hundred feet on each side thereof. That is a question not now before us.

Petitioners again go into a long argument to show that the

use to which a thing is put may determine whether it is or not a fixture.

Admitting the proposition to be true, we do not see its applicability to this case. A large building erected on the soil with steam engine, etc., for hoisting ores we fully admit to be a fixture. But a fixture to what? To the soil on which it stands? The difficulty with plaintiffs here is, not that they failed to show that such a building was a fixture (we are not aware that any one disputes that), but they failed to show any right of possession to the soil on which the building stands. If plaintiffs were entitled to the soil on which this building stands, they would have been entitled to the building if it had been erected to grind corn.

If they were not entitled to recover the soil, they could not recover the house standing thereon, although it was erected for the purpose (unlawful, perhaps, if you will) of taking ore from plaintiffs' mine. The purpose for which a house is erected can not change its locality. Nor can we see how that purpose is to affect, in any way, the rights of plaintiffs to recover the ground on which it stands.

The petition for rehearing is denied.

HEBRARD v. THE JEFFERSON GOLD AND SILVER MINING COMPANY.

(33 California, 290. Supreme Court, 1867.)

[1] **Necessity of demand in ejectment against co-tenant.** In ejectment by one tenant in common against his co-tenant for an undivided interest in a mine, the plaintiff introduced evidence of his title and rested without any proof of a demand to be let into the possession, and the court thereupon directed the jury to return a verdict for the defendant: *Held*, correct, because plaintiff had not made out a *prima facie* case when he rested.

Evidence excluded without prejudice. The defendant having introduced evidence of title to the premises in controversy by conveyance from the plaintiff, the latter offered proof that he was a minor at the date of the execution of the deed, and had repudiated the same immediately upon

[1] *Colman* v. *Clements*, 5 M. R. 247.

attaining his majority, but the court ruled out the evidence: *Held*, that the plaintiff having failed to make out a *prima facie* case, the exclusion of this testimony did not affect his rights.

Appeal from the District Court, Tenth Judicial District, Yuba County.

The complaint averred that the defendant was a corporation, and that the plaintiff, on the first day of January, 1862, became the owner of one sixth undivided interest of a quartz ledge at Brown's Valley, and had continued to own it since; and that on the 17th day of November, 1863, the defendant entered into possession, and had since withheld possession from the plaintiff.

Plaintiff did not offer any evidence tending to show a demand to be let into possession. After the plaintiff rested, defendant introduced in evidence a deed from plaintiff to one Frazier, and also offered evidence to show that defendant had succeeded to Frazier's right. Plaintiff offered to show that the deed was made when he was a minor, and that he had disaffirmed the conveyance immediately after he became of age. The court, on defendant's objection, excluded the evidence. The court instructed the jury to find a verdict for the defendant. The verdict and judgment were for the defendant, and the plaintiff appealed both from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the court.

F. J. MCCANN and J. O. GOODWIN, for appellant; argued the questions of the exclusion of the evidence to prove the infancy of plaintiff when the deed was made, and of his avoidance thereof, and of the instructions of the court to the jury.

G. N. SWEZY and CHAS. E. FILKINS, for respondent; argued that there having been no proof of an ouster, the verdict would have been the same if defendant's evidence had been admitted, and that the plaintiff sustained no injury, therefore, by the instruction of the court.

By the Court, SHAFTER, J.:

Ejectment to recover the possession of one undivided sixth part of certain mining property situated in the county of

Yuba. The plaintiff claims to be the owner of the fractional interest named, and though it is not alleged in so many words that the remaining five sixths belong to the defendant, yet it was the obvious intention of the pleader to present the parties as standing to each other in the relation of tenants in common: for it is charged that the plaintiff, on a certain day, "demanded of the defendant the possession of his said interest," and demanded, also, "a *participation* in the profits and proceeds of the working of said ground, to wit: the one sixth part thereof," and that the defendant "refused to comply with the demand." It certainly is not usual for a plaintiff in ejectment against a stranger to the title, to make a demand of possession as a prerequisite to the action, nor to content himself with claiming a "participation" in proceeds and profits.

The title of the plaintiff, the demand and refusal, or, more generally stated, the ouster alleged, were all denied by the answer.

It appears that the plaintiff introduced evidence tending to prove his title, merely, and rested. The defendant thereupon introduced evidence tending to prove that he was the owner of the mine in severalty, and rested. The court directed the jury to return a verdict for the defendant.

The questions raised in argument are upon the validity of the foregoing instruction, and the correctness of certain rulings of the court excluding evidence offered by the plaintiff tending to disprove the defendant's title.

As to the instruction, it was manifestly correct, for the plaintiff had not made out a *prima facie* case under the issue joined when he rested. As the plaintiff was not entitled to a verdict on the proofs submitted by him, the exclusion of the evidence rejected by the court could not have injuriously affected any substantial right of the appellant. The evidence so excluded had no tendency to prove the averment of ouster. For this reason we do not consider the questions discussed by the learned counsel for the appellants as fairly arising on the record: *Enright* v. *San Francisco and San Jose Railroad Company*, 33 Cal. 230.

Judgment affirmed.

Neither Mr. Justice SAWYER nor Mr. Justice RHODES expressed any opinion.

FELGER V. COWARD.

(35 California, 650. Supreme Court, 1868.)

Vendee under executory contract can not recover in ejectment—Specific performance. C. agreed, in writing, to convey to F. an interest in a certain mining claim, upon payment by F. of the purchase price. F. performed his part of the agreement, and also worked in the mine for wages, receiving in addition thereto a share of the dividends proportionate to the interest which C. had agreed to convey to him. Afterward C. refused to make the conveyance, and F. brought ejectment for the possession of an undivided eighth interest: *Held*, that, as F. showed only a contract to convey, his remedy should have been for a specific performance, and, as incidental thereto, delivery of the possession.

[1] **Parol sale of claim.** The statute of 1860 is mandatory that sale of mining claims must be in writing.

Appeal from the District Court, Thirteenth Judicial District, Mariposa County.

This was an action of ejectment for the possession of an eighth undivided interest in a mining claim and quartz mill situated in Mariposa county. The complaint was in the usual form, and the answer traversed all of its material averments. It appeared from the evidence at the trial, which was by the court, without a jury, that the defendant entered into a written agreement with plaintiff to convey to the latter by sufficient deed, said interest in said mining claim and mill, upon the payment to the defendant, at a stipulated time, of the purchase price, for which a promissory note was executed and delivered by plaintiff to the defendant. The evidence further tended to prove that plaintiff had, before suit brought, complied with said agreement on his part, and that the defendant refused to make said conveyance as stipulated, and repudiated said agreement. Prior to the execution of said agreement the plaintiff had been at work in said mine in the employ of the defendant and others of its owners, and after said agreement and until a short time before the commencement of this suit, the plaintiff continued at work in said mine, receiving wages for his labor, and the dividends therefrom proportionate to

[1] 3 M. R. 415, note 14.

said interest therein, of which, according to said agreement, he was to become the purchaser.

Judgment passed for the plaintiff in the court below, without any findings of fact being made and filed, and thereupon the defendant moved for a new trial, on the ground that the judgment was against the evidence and against law. The motion was denied, and the defendant appealed from the judgment and from the order denying said motion for a new trial.

LEWIS SHEARER, for appellant.

J. G. MCCULLOUGH, for respondent.

By the Court, SANDERSON, J.:

In *Patterson* v. *The Keystone Mining Co.*, 30 Cal. 360, our attention was called to the statute of the 13th of April, 1860 (Stats. 1860, page 175), in relation to the conveyance of gold mining claims, and we considered, *arguendo*, that it had abrogated the rule announced in the case of the *Table Mountain Tunnel Co.* v. *Stranahan*, 20 Cal. 198, to the effect that title to a mining claim would pass by a verbal sale, if accompanied by a transfer of the possession. In the subsequent case of *Goller* v. *Fett*, 30 Cal. 484, the effect of the statute came up for further consideration, and its construction became indispensable to the final disposition of that case, and the effect suggested in *Patterson* v. *The Keystone Mining Co.* was formally declared to be the effect of the statute, and that title to gold mining claims could be passed only by an instrument in writing. See also *King* v. *Randlett*, 33 Cal. 318.

The rule established in *Goller* v. *Fett* seems to be conclusive of the present case. It is an ordinary action of ejectment, and the plaintiff, at least, showed only a contract by the defendant to convey. His remedy was for specific performance, and, as incidental to that, delivery of the possession.

Order denying a new trial reversed, and a new trial granted.

Mr. Justice SAWYER expressed no opinion.

RYND V. RYND FARM OIL COMPANY.

(63 Pennsylvania State, 397. Supreme Court, 1869.)

Ejectment by licensor of oil land. Rynd granted to Watson the exclusive right of digging for oil on a certain farm, reserving the right to farm the surface. If the boring proved profitable, the writing was to be construed as a perpetual lease; if otherwise, possession was to revert to Rynd. On part of the farm the boring had been profitable. Rynd, alleging that the boring had not been profitable on another part of the farm, brought ejectment for that part: *Held*, that ejectment would not lie to test Rynd's right to bore for oil.

[1] **Idem—When a proper remedy.** Ejectment under the agreement would lie if Watson had occupied the land for other purposes, or to an extent greater than allowed by the contract, or if the license was revocable, or had been forfeited by Watson.

License—How made perpetual. When the land was entered upon and the license made effectual by Watson's performance of the covenants and a successful result of the experiment, it became perpetual and irrevocable.

Error to the Court of Common Pleas of Venango County.

Action of ejectment by John Rynd against the Rynd Farm Oil Company for about 114 acres of land.

The land in controversy was that part of a tract of 328 acres lying on the west side of Oil creek. The whole tract belonged to the plaintiff on the 19th day of January, 1860. On that day this agreement was made: "Articles, etc., between John Rynd of, etc., of the one part, and Jonathan Watson and Jacob D. Angier of, etc., of the second part, witnesseth, that the said party of the first part, for and on account of the covenants and agreements hereinafter mentioned, doth covenant and agree, that they, the said parties of the second part, their heirs and assigns, shall have the exclusive right and privilege of digging, boring, or otherwise operating for salt and oil on the farm and land owned and occupied by the party of the first part situate in the township of Cornplanter, county of Venango, bounded as follows, etc., containing about 328 acres, more or less, together with the right of obtaining

[1] *Clement* v. *Youngman*, 5 M. R. 230.

by pumping, or in any other manner collecting said salt water and oil, and manufacturing salt, refining or otherwise preparing oil for use and the market, with the full and unobstructed right of way to and from all the springs, wells and other works they may dig, bore or construct, or cause or procure to be dug, bored, erected, constructed or builded on said premises, with the privilege of erecting such buildings and apparatus as may be necessary or convenient for the purpose aforesaid. And the said party of the second part, for themselves, covenant and agree to and with the said party of the first part, that they, the said party of the second part, bore or dig one or more wells, not less than two hundred feet deep, if necessary to obtain salt or oil from the same to the best advantage, working with proper skill and energy for the interests of both parties, and give to the party of the first part the one fourth part of all the oil obtained on or out of said premises; and should said second party think proper to engage in the manufacture of salt from any salt water they may find on said land, then they are to give said first party one-twelfth part of said salt so manufactured, said first party to be at no expense whatever, and to receive his share of the oil and salt at the mouth of wells and salt works on the first secular days in each month after oil in profitable quantities shall be found and salt manufactured. And should other valuable minerals be found in boring, digging or operating on said premises for oil and salt, the said party of the first part shall receive at the pit's mouth the one fourth part thereof, to be delivered monthly, in like manner as the oil and salt are delivered, if the business of mining and operating for the said minerals should be found profitable for both parties. The said work of boring, etc., as above stated, to be commenced by the party of the second part within one year from the 1st day of September, 1859, and be prosecuted with reasonable diligence and energy until oil and salt be found, or further search be deemed unprofitable and unnecessary; and in case the said second party, after a fair and reasonable experiment and search, be satisfied that oil and salt, or either, can not be found in sufficient quantities to be profitable to both parties, this lease shall be determined and ended, and the entire possession, with all the improvement made thereon by said second party, etc., shall revert to said

first party, etc.; and should the said second party occupy any considerable portion of the improved land of said first party, with the works, buildings and apparatus which they may dig, bore, build, erect or construct, to the damage of the said first party, the said second party shall pay to the said first party a reasonable rent or compensation therefor. The said first party expressly reserves so much of said land as lies, etc., * * * and should this lease be determined as hereinbefore mentioned, and the possession and improvements revert, it is understood that the said second party may remove their machinery, engines, pumps, etc.; and should oil and salt, or either, be found in profitable quantities, this is a perpetual lease for all the purposes therein mentioned; and further, said first party expressly covenants and agrees that he has not sold or leased any part of the premises herein demised, since the 1st day of September, 1859; and it is further understood that the said second party are not to interfere with the farming operations of said first party any more than may be necessary and proper to guarantee the said second party the full enjoyment of the premises for the purposes mentioned in this agreement."

The following supplemental agreement was made July 2d, 1861:

"I hereby declare and agree that the above-named lessees, etc., shall and may have the right to assign or sub-let the rights and privileges therein and thereby granted to them as to fractional parts of the premises in the above lease or article, to which I add this as a supplement; and further, I, the said John Rynd, etc., do also agree to take my share of the oil and furnish barrels for the same, so as not to impede or hinder the operations or work of the said second party, their heirs and assigns, whenever it may be necessary, on account of room or otherwise desirable, to sell or send away, or put up for market, and any damages for the use of improved land, so far as the parts sub-leased, shall be from this date dispensed with, as the supposed increase of oil, by reason of sub-leasing will amply compensate for that. It being understood that the said Watson and Angier, etc., are to go on and have the premises heretofore leased surveyed into such sized lots as they may deem proper, and to sub-lease the same to the best advantage, and to have the same worked to the best advan-

tage, either to success or abandonment, and to have the map or plat of said survey made, and to furnish the said Rynd a copy, free of charge."

The agreement was under seal and signed by both parties.

The defendants derive their title from the above lessees.

On the trial before TRUNKEY P. J., Watson testified for defendants that they had commenced operations on the east side and had taken others into partnership with them; the operations had been successful; the wells on the west side had not been productive; they yielded a little; the failure to get oil there was not conclusive that there was no oil there; they had ceased working on it.

By another witness it was testified that up to 1865 seventeen wells had been sunk on the west side; one was sunk in 1866; the engine had been recently taken away; all the wells were tested; the machinery was moved away from all the wells that did not produce.

The plaintiff in rebuttal, gave evidence tending to show that the defendants had put buildings, etc., on the land not necessary for carrying on their mining business; they also gave evidence of the failure and abandonment of the wells on the west side and the removal of the machinery; of sub-lettings, the rates of the leasing, etc.

The plaintiffs' claim for the 114 acres was on the ground that it was not occupied by the defendants and was not necessary to work the wells which were yielding oil.

The plaintiffs' 1st and 3d points were:

1. The agreement of 19th January, 1860, gave a license to Watson and Angier to take salt and oil from his lands, and was revocable by Rynd at any time.

3. The agreement of 2d July, 1861, gave only a license to Watson and Angier to confer the same privilege they had upon third persons, for the benefit of Rynd, and was revocable by him at any time.

These points the court, TRUNKEY, P. J., denied, and further said in his charge: * * * "In very words, Watson and Angier, their heirs and assigns, shall have perpetually the exclusive right of boring and operating for oil and salt on the whole farm, except the part reserved by defined bounds, and may assign and sub-let their right as to fractional parts of

the premises; they, their heirs and assigns, may use all the surface necessary and convenient for their full enjoyment and operations under the grant, and not to interfere further with the owner of the land for farming purposes. The consideration for this grant is the covenant already stated on the part of Watson and Angier. They are bound, amongst other things, to commence work by a certain date, to work with skill and energy for the interest of both parties, to deliver a certain portion of the oil or salt to Rynd at certain times, to survey and divide the premises into lots, sub-lease and have them worked to the best advantage. [With such grant, upon such consideration, it would seem that the parties had made the right of the grantees to take the oil and salt exclusive of the grantor, as well as other persons. The important right to divide and sub-let is not consistent with the claim that Rynd retained the right to take oil and salt in common with the grantees.] This right was given after he had ample time for reflection and observation of the manner in which the grantees were performing their covenant in the first article. The exclusive right to take oil from the land, and to divide and grant small lots in severalty for oil operations, would be essentially interfered with in case the grantor would go on when and where he pleased to operate for oil.

"[If oil is discovered in paying quantities, and of this no question is made, the grant is perpetual, not of a part, but of the whole, Rynd and those under him reserving the fee simple estate, with right to occupancy of the soil, when the same is not necessary and convenient for the object contemplated by the lease. The article makes no provision for a return of the land in parts, as to oil rights, when oil is not found thereon. It does not provide for forfeiture of the rights granted in whole or in part in case of breach of covenant. The grant and reservations, covenants and restrictions are similar to those in case of *Funk* v. *Haldeman*, 3 P. F. Smith, 229. The similitude is such that I do not hesitate to conclude, on the authority of this case, that Rynd granted to Watson and Angier in fee simple, an incorporeal hereditament, made divisible by the terms of the grant, by the parties made exclusive in the grants within the designated lines; that whatever rights are reserved to Rynd for agricult-

ural and other purposes, within the lines, he has no right to take oil or salt therein, and can have none until the grantees and those claiming under them have forfeited their rights by breaches of the covenant.]"

"This action is to cover that part of the tract lying on the west side of Oil creek. It is unnecessary to inquire why it is not for the whole tract, or for all of it not actually operated upon for oil purposes. Whether or not the entire eastern side is operated upon we are not advised, nor is it material. The defense is rested on the same ground as if the action were for the whole instead of a part. The plaintiff may recover this part if the defense is not good. The plaintiff claims a verdict for the land not actually occupied by producing oil-wells, being all except about two acres on the west side of the creek. Rynd has the right of possession and enjoyment of the surface for all purposes, save of so much as may be necessary and convenient for the object of the grant. If oil has been found in profitable quantities, and the granted rights have not been forfeited, the grantees, or the defendants holding under them, have a right of possession to all the surface necessary and convenient for the object given them. Should the evidence satisfy you that the defendants have taken and occupied the land for other purposes than the right given, and that they have excluded Rynd from possession of the surface when it is not required for oil operations, preventing him from enjoying the right of which he had not divested himself, then he ought to recover the premises wrongfully taken from him. But if there is not evidence to show that the defendants have taken and held the land to any greater extent than required for their oil operations, and have not otherwise interfered with Rynd's enjoyment of the premises, he can not recover for this reason: Each party has certain rights, and when one has not wrongfully interfered with the others' premises, there can be no recovery.

"Did the defendants, or Watson and Angier, within the time mentioned in the agreement, make search and find oil in profitable quantities? Have they expended large sums of money in sinking wells? Have they prosecuted the work of obtaining oil with reasonable diligence, obtaining large quantities, averaging some 25,000 or 30,000 barrels annually? If you find they did all this, then, although they

may have failed to perform the covenant to the full extent, their rights are not forfeited. Forfeitures at law, as well as in equity, are odious. They may be answerable for non-payment of rent for use of improved land; for not making the survey; for not working with greater diligence; but if they have performed their covenants to the extent stated, the grant is not forfeited. It is not a question here how much damage could be recovered in an action of covenant, or whether Rynd contracted with as much or greater wisdom as others who have leased their lands. There is no allegation that the grant was obtained by fraud or imposition, and the defense is not available that he might have had more favorable covenants. You will observe that your attention has been directed to some facts, while there has been little question made as to them. They are for you to pass upon, and under the instructions given, as you find the facts, your verdict will be for the plaintiff or defendant."

The verdict was for the defendants. The plaintiff removed the case to the Supreme Court, and there assigned for error the answers to his 1st and 3d points, and the portions of the charge in brackets.

E. COWAN and H. D. FOSTER, (with whom was J. D. HANCOCK) for plaintiff in error. The grant is exclusive and indivisible: *Funk* v. *Haldeman*, 3 P. F. Smith, 229; *Dark* v. *Johnston*, 5 Id. 164; *Grubb* v. *Bayard*, 2 Wallace, Jr., 81; Bainbridge on Mines, etc., 246; Coke Litt. 122, Hargrave's note; *Caldwell* v. *Fulton*, 7 Casey, 480; *Lord Mountjoy's Case*, Godbolt, 34; S. C., Anderson, 307; *Johnstown Iron Co.* v. *Cambria Iron Co.*, 8 Casey, 246; *Chetham* v. *Williamson*, 4 East, 469; *Clement* v. *Youngman*, 4 Wright, 344. If Rynd had revoked the license before the entry of the licensees they could not have maintained a bill in equity; their covenants want mutuality: *Bodine* v. *Glading*, 9 Harris, 50; *Vincent* v. *Huff*, 4 S. & R. 302; *McNair* v. *Compton*, 11 Casey, 23.

J. B. BRAWLEY and D. DERRICKSON, for defendant in error, cited *Funk* v. *Haldeman; Lord Mountjoy's Case, supra; Douglass* v. *Kindall*, Yelverton, 187; *Hoskins* v. *Robins*, 2 Saunders, 327; *Potter* v. *North*, 1 Id. 352.

The opinion of the court was delivered by AGNEW, J.

The most difficult and important question argued in this case is, whether the license to Watson and Angier, to operate for oil, is entirely exclusive of Rynd, the owner of the land. But this does not arise in the form of action adopted by the plaintiff. The action is ejectment and relates to the possession only of the land. Assuming that the defendants had taken possession and occupied the premises for other purposes, or to an extent greater than that provided in the contract, or that the license was revocable by Rynd, or had been forfeited by the defendants, the form of action would be a suitable remedy. But the right of Rynd to bore for and take oil from the land can not be tested in this form of action. Should he attempt to exercise this right, a conflict would arise with the defendants claiming a right exclusive of Rynd, who might test his claim by an action for a breach of the contract, or possibly by a bill in equity; but the exclusiveness of their right is not a question in this action.

The court below in clear and explicit language left to the jury the fact whether a possession had been taken by the defendants to a greater extent than was necessary for their oil operation, or so as to interfere with the possession reserved by Rynd to himself. The fact has been found by the jury against the plaintiff, and this leaves only the questions of revocation and forfeiture. We agree with the learned judge, and the authorities cited by the defendants as plaintiffs in error show, that this license, when entered upon and made effectual by the performance of the covenants of the defendants and a successful result, according to the terms of the agreement is perpetual and irrevocable. We think he also fairly submitted the question of forfeiture with proper instructions, in terms consistent with the provisions of the agreement. That fact being determined against the plaintiff, nothing remains but to affirm the judgment, leaving out of view the question of the exclusiveness of the license. This point not fairly arising in the case it would be improper to state an opinion, which would not be binding as a decision in a future controversy. It admits of argument, and may not be ruled by *Funk* v. *Haldeman*, 3 P. F. Smith, 243; but we forbear to express an opinion.

Judgment affirmed.

THE SILVER MINING COMPANY V. FALL ET AL.

(6 Nevada, 116. Supreme Court, 1870.)

Question as to whether lode or spur—Degree of proof necessary to support a theory. Plaintiff and the defendants, claimants on different parts of the Arizona lode, had agreed upon a division line, the defendants receiving from the plaintiff a conveyance of all its interest north of the line, and the plaintiff taking a like deed for the interest of defendants south of the line, and the defendants being charged with working a deposit on plaintiff's side of the line, attempted to show that the deposit was a separate ledge, or if the same, it was a spur which struck off from the Arizona ledge at a point north of the line, the plaintiff asserting that it was a single ledge, neither theory being demonstrated by complete developments. The court instructed the jury that when the plaintiff attempts to recover a mining claim upon the strength of a stated theory, "the existence of such a theory must be established by the plaintiff conclusively, and not merely by a preponderance of evidence." It was *held* that such charge was error. *Held, further*, that the word "existence," if taken literally, reduces the words of the charge to nonsense, and was intended for "correctness," but that the charge was as apt to mislead the jury in the form in which it was given, as if proper language had been used.

Evidence—Theory of veins. When the establishment of the plaintiff's case depends upon the establishment of a theory as to a vein formation, the correctness of the theory need not be established by any stronger proof than would be required for the case itself, *i. e.*, by a preponderance of evidence.

Value of secondary evidence. If secondary evidence be admitted at all, to establish a fact, it requires no more of such evidence than of the best; a preponderance is all that is necessary.

Practice Act construed—Development. The statutes of Nevada allowing mining suits in certain cases to be continued until further development is made, can not be construed as excluding all evidence as to the identity of the veins except that produced from actual workings.

Appeal from the District Court of Humboldt County, Fifth Judicial District.

THOMAS H. WILLIAMS, for appellant, the plaintiff below.

R. S. MESICK and GARBER & THORNTON, for respondents.

By the Court, LEWIS, C. J.:

The parties to this action having had some controversy concerning their respective rights upon a certain quartz ledge,

on the twentieth day of April, A. D. 1869, for the purpose of compromising the difficulty, each executed to the other a deed of conveyance, whereby the plaintiff conveyed to the defendants all its right, title and interest in the Arizona ledge, lying south of a designated point, together with all the spurs and angles; and Fall and Temple, in return executed a deed to the plaintiff, which declares: "That the said parties of the first part (Fall and Temple), in consideration of a full and amicable compromise and settlement between the parties hereto, upon the terms stated in a stipulation on file in the Fifth Judicial District Court, State of Nevada, of certain actions at law between said parties in said court, and the further consideration of a good and sufficient deed of conveyance, conveying all the right, title and interest of said party of the second part to said parties of the first part of, in and to all that portion of the Arizona ledge, lead or lode, situate in Buena Vista mining district, Humboldt county, Nevada, lying south of a point on said ledge marked by an iron pin driven into the rocks on the west side of the upper tunnel, fifteen feet north of the incline of said party of the second part bearing on said ledge, hereby grant, bargain and sell, remise, release and quit claim unto the said party of the second part, all the right, title and interest of the said parties of the first part of, in and to the following described mining ground, situate in the said Buena Vista mining district, to wit: All that portion of the Arizona lead or lode lying south of an iron pin driven into the rocks on the west side of the upper tunnel, fifteen feet north of the incline of said party of the second part, in and upon said Arizona ledge for a distance of twelve hundred feet in a southerly direction from said iron pin, and all right, title and interest in and to said ledge south of said point, by virtue of, and by reason of, the location of the claim known as the Manitowock No. 2, together with all the dips, spurs and angles, rights, privileges and appurtenances thereof."

The defendants having passed south of a line protracted westerly from the pin mentioned in the deed, and at a point about seventy-five feet southwesterly from the pin, and having come upon argentiferous rock, proceeded to take it out and appropriate it, when this action was commenced by the plaintiff, it claiming that they were upon that portion of

the Arizona ledge deeded to it by the instrument above referred to; that is, south of a line protracted from the iron pin. That they are south of such line is conceded, but it is claimed by defendants that they are not on the Arizona ledge, or if so, that they are on a spur projected from the ledge north of the line and extending south of it, and consequently, that it belongs to that portion of the ledge lying north of the line, although extending south of it. The plaintiff claims that the ledge lies rather horizontally in the hill, and that the defendants are at work on the same ledge as that in which the iron pin is driven, or what is called in the deed, the Arizona ledge. It is also claimed by plaintiff that the defendants have no right to follow a spur or angle of the ledge south of the division line designated by the pin.

After a conclusion of the evidence upon these issues in the court below, the judge charged the jury in this manner: "When a mining claim is sought to be recovered in an action on a theory alone, and the correctness of such theory is denied by the defendant in the action, the existence of such theory must be established by the plaintiff conclusively, and not merely by a preponderance of evidence, in order to entitle him to recover, that is, where there is no actual developed connection between the ledge owned and claimed by the plaintiff and the one he seeks to recover as a part of the same lode."

The giving of this instruction is assigned as error by the plaintiff. By the words "existence of such theory" must be understood correctness of such theory. To say that the court meant that the *existence* of a theory must be conclusively proven would simply make nonsense of the instruction. The court evidently intended to say, and it must be assumed the jury so understood it, that the correctness of the theory must be so established. A theory exists if it be simply announced by a single individual. So there can be no question of preponderance of evidence to establish its existence, but there may be as to its correctness.

That it misstates the law, and when taken in connection with the facts of this case was calculated to mislead the jury, can scarcely admit of doubt. Let the facts be examined. The

main issue between the parties was the identity of the ledge owned by the plaintiff and into which the iron pin was driven, and the body of quartz upon which the defendants were working. The plaintiff claimed that its ledge lay in the hill in a horizontal position, dipping in the center, forming a saucer-shaped deposit; that it extended to where the defendants were at work, and that the ore taken out by them was from this ledge. There was no developed connection, as the instruction would seem to require, between the plaintiff's portion of the ledge where the pin was driven, and the point at which the defendants were at work. A drift had been run a portion of the way, but it remained incomplete when the action was tried. Thus, at the time of trial, there was no developed connection whatever south of the line dividing the claims of the respective parties between the point where the defendants were at work and the ledge admitted to be owned by the plaintiff. Under the circumstances, it became necessary for the plaintiff to rely upon a theory, which was, that the ledge was in the form and lay in the position already mentioned. This theory or conclusion was doubtless drawn from what could be observed from the configuration of the hill, and from such developments as had been made in the neighborhood. But the instruction made it necessary to establish its case either by such developed connection or by a conclusive establishment of its theory respecting the position of the ledge. Not having made such development, and being compelled to rely upon what is here called theory, it becomes necessary to determine whether such theory must be conclusively established, or only like any other fact upheld by a preponderance of evidence. If a party be entitled to recover at all, upon a theory, why should it be required to be established by evidence different from any other fact? What is here called a *theory*, if it be established, would have entitled the plaintiff to recover. To establish the correctness of the *theory* was to make out a case for the plaintiff. If correct, the plaintiff would undoubtedly be entitled to recover, and upon such correctness its case depended.

In many cases, as it may have been here, the proof adduced to establish the theory as directly and strongly tends to make out the main case as to establish the theory itself;

that is, where the establishment of the theory is equally an establishment of the case. Why then should the correctness of the theory be established by any stronger proof than the case itself? Wherefore the rule that a theory should in any case be conclusively established? If a drift were run to connect the ledge upon which the pin is driven, and the *locus in quo*, and there was upon examination a question as to whether there was a continuous quartz connection, or whether the drift for its entire length passed through vein matter, surely the plaintiff would not be required to establish these facts conclusively. If its evidence outweighed that of the defendants upon them, it would be entitled to recover; but not more so than if the preponderance of evidence established the theory upon which the plaintiff relied in this case. If, for example, the theory advanced by plaintiff that its ledge lay horizontally in a saucer shape in the hill could be established to the satisfaction of the jury, it would tend at least to make out its case. Why then should it be required to establish the correctness of such theory conclusively, any more than any collateral fact in a case from which the main issue is deduced? It is very seldom that direct and positive proof is presented upon the main issues between parties in any case. The main facts are generally deductions from collateral facts proven. So here the theory advanced by the plaintiff was not direct evidence that the defendants were at work on the ledge in which the pin was driven, but it was, if established, a collateral fact tending to establish it. If the plaintiff had the right to rely upon a theory at all, and produce evidence to establish it, certainly there is no rule of law known to the books which requires it to be conclusively established. The law requires nothing to be conclusively proven. It leaves that degree of certainty to the domain of mathematics. All that is generally required in civil actions is a preponderance of evidence upon any issuable fact.

But it is argued that the instruction was not relevant to the case, because the plaintiff did not rely upon theory alone and hence if erroneous the case should not be reversed, because it can not be presumed the jury were misled by a statement of an abstract proposition of law not applicable to the facts. Counsel are certainly mistaken as to the matter of

fact. The instruction required from the plaintiff either developed a connection between the plaintiff's ledge and the point of dispute, or a conclusive establishment of its theory. Now it can not be claimed that there was any such developed connection. It was admitted at the argument that the drift which had been projected to make such development was not completed. The developments which were made in the chamber, and by the defendants, certainly did not amount to a developed connection between the ledge marked by the pin and the point where defendants were at work, nor did any or all of the developments existing at the time of trial make such connection between the two points. The plaintiff was then driven to the necessity of advancing its theory of the horizontal position of the ledge, and in that way establish the fact that it extended to the point in dispute. The defendants claimed that there were two ledges decussating each other at a point north of the division line; but the plaintiff sought to show that there was but one ledge south of the division line, and that the defendants were at work upon it. This was not established by development—that is, by a drift extending from the known ledge to the point in controversy—hence the necessity for the theory which was adopted to rebut the case made by defendants.

Again it is argued that the theory attempted to be established by plaintiff was not the best evidence, and that the legislature of this State, by authorizing a delay of proceedings in cases of this kind, for the purpose of allowing developments to be made, intended to require actual development as the best evidence. If the evidence offered by the plaintiff were not the best evidence, the proper course was to object to its admission. If admitted at all, we know of no rule which requires more evidence of secondary character to establish a fact than of the best. In either case, a preponderance is all that is generally required.

Nor can we see any thing in the statute referred to, from which to conclude that the legislature intended to make actual development the best or only evidence in mining cases. The section referred to simply authorizes the delay of proceedings for the purpose of allowing either party to make developments should they choose to do so, without any intimation that that should be the only evidence admissible.

The fifth instruction seems also to be incorrect; but as our views of the one above referred to necessitate a reversal of the case, we deem it unnecessary to discuss it.

The judgment of the court below must be reversed. It is so ordered.

WHITMAN, J., being disqualified, did not participate in the above decision.

Reversed.

KARNS ET AL. v. TANNER.

(66 Pennsylvania State, 297. Supreme Court, 1870.)

[1] **Where one party is deceased the survivor can not testify.** Parker leased oil territory to Tanner. Parker took possession, alleging abandonment and forfeiture by Tanner, who afterward died, and his interest was sold by the sheriff. In ejectment by the vendee, *held*, that Parker was not a competent witness under the act of April 15, 1869, which was intended to exclude the testimony of the surviving party to a contract where the party opposed in interest has died, such being the intent of the act although Parker could not be described as coming within its literal terms.

Idem. When a party to a thing or contract in action is dead and his rights have passed by his own act or the law to another, who represents his interest, the surviving party shall not testify to matters occurring in the life of the adverse party.

Admissions of agent as to his principal's motives. The declarations of an agent employed to sink an oil well are not evidence of the reasons of the principal for ceasing to operate.

The abandonment of an oil lease is a question of intention to be found by the jury on an investigation of the facts.

Ejectment will lie by the lessee of an oil well who has been ousted, possession being essential to enjoyment of the lease, even if the right conferred by the lease was but an incorporeal hereditament.

October 17, 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Armstrong County: No. 67, to October and November Term, 1870.

This case was an action of ejectment brought by James P. Tanner against S. D. Karns, John Karns, Fullerton Parker and William J. Parker, to March Term, 1868.

[1] *Whitsett* v. *Kershow*, 4 Colo. 419.

Subsequently the plaintiff died, and June 12, 1869, Frances E. Tanner, his executrix, was substituted; on the 8th of March 1870, "executrix" was stricken out and "purchaser of the interest of James P. Tanner at sheriff's sale," substituted.

The premises in controversy were "two small lots * * * on one of which an oil-well is drilled;" of which the title was in Fullerton Parker, March 7, 1866. On that day he entered into an agreement with James P. Tanner, as follows:

* * * "That the said party of the first part, in the consideration of the sum of $500, etc., and the covenants hereinafter stated by these presents, does hereby grant, etc., unto the said party of second part, his heirs and assigns, all the oil and mineral rights and privileges, to, on, in and under that certain tract of land situate in the township of Perry, county of Armstrong, etc., bounded as follows, to-wit: commencing at the tan-yard run at low-water mark; thence up the river 300 feet or up to a pine tree; thence west to the public road; thence south by said road to said tan-yard run to place of beginning; also one other piece of land situate below said tan-yard from his (Parker's) line up to tan-yard, including all below the public road to low-water mark, containing —— acres, more or less.

"To have and to hold, occupy, use and enjoy the said rights and privileges aforesaid, with the right of way on, to, over and into the said premises, and rights and privileges for the purpose of prospecting, boring, mining, drifting or otherwise operating for oil, coal or other minerals, and with the right of timber, stone, etc., necessary to carry out the objects of this agreement, and with the further right to erect and maintain all buildings and machinery necessary and convenient therefor, and remove the same at pleasure.

"The said second party agrees to deliver to the said first party the one fourth part of all oil obtained on said premises, to be delivered at the tank, etc.; * * * the said second party is hereby bound, under a penalty of forfeiture of the rights and privileges hereby granted, to commence operations by boring or mining within one year from the date hereof, and prosecute the same with reasonable diligence. This lease to continue for the term of fifty years."

Parker assuming that Tanner had failed to prosecute opera-

tions with diligence, and had abandoned the lease, entered as for condition broken, and on the 25th of June, 1868, leased to the other defendants, who entered into possession.

The case was tried, March 17, 1870, before BUFFINGTON, P. J.

The plaintiff gave evidence of the payment of the $500 and of other expenditures for machinery, etc., to about $4,000; that Tanner commenced operations in May, 1866; G. W. Homer was employed by him to superintend the boring, etc.; the well was sunk about eight hundred and thirty feet, and oil found, which was shipped in November, 1866.

G. W. Tanner, a son of J. P. Tanner, testified that in December, 1867, his father and F. Parker had a conversation about the well, etc., at which witness and Parker's son were present; Tanner said the money market was tight; he could not spare money from his business, but in a short time he would send one of the boys up to take charge of the well; he was confident there was enough oil to make himself and Parker well off; in March, 1868, proceedings in bankruptcy were commenced against Tanner; he was struck down with paralysis about July 1, 1868, and was not able to do anything until his death, April 13, 1869. The plaintiff gave other evidence of conversations between Parker and Tanner, tending to show that neither considered the lease abandoned.

They gave in evidence a sheriff's sale, May 22, 1869, of Tanner's interest in the lease to Frances E. Tanner, the plaintiff; also proceedings in bankruptcy against Tanner commenced by petition of creditors, April 24, 1868, and the petition dismissed February 2, 1869, at the cost of petitioners.

The defendants gave evidence by W. Morgan that in May, 1866, he was employed by Homer, the agent, to help sink the well, and continued until November; after testing it for two or three weeks, it turned out to be pretty near a failure. The defendants then offered to prove by the witness that he was discharged from further testing the well by Homer, the agent of Tanner, because Homer declared the well a failure, and that on that account it was no longer necessary to continue testing.

The plaintiff objected to the offer; the court allowed witness to testify that he had been discharged by Homer, but would not permit him to testify the reasons given, as not be-

ing within Homer's agency. A bill of exceptions was sealed for the defendants.

Homer remained there a short time afterward; in March or April, 1867, the derrick and all the machinery but the engine were moved to another well about two hundred rods distant; the well remained unoccupied from that time until July or August, 1868, when work was commenced under defendants; they went about thirty feet deeper, when it turned out to be a good well.

E. Marshall testified that he assisted in taking down the derrick under Homer; that it, with the engine, was hauled to Parker's landing; there was nothing left on the ground.

The defendants offered Fullerton Parker, a defendant, to testify; he was objected to by the plaintiff as incompetent; was rejected and a bill of exceptions sealed.

There was evidence also in contradiction of the testimony of G. W. Tanner, and tending to show that Tanner had abandoned the lease.

The following were points of the defendants, with the answers:

1. "The agreement of the 7th of March, A. D. 1866, between Fullerton Parker and James P. Tanner did not confer upon said Tanner any right to realty; said agreement is but a license to bore for oil and mine for coal, and under it said Tanner had and acquired thereby nothing more than a chattel interest, an incorporeal hereditament, for which no action of ejectment can be maintained, and therefore, for this reason, the plaintiff is not entitled to recover."

Answer: "This point is answered in the negative."

3. "If the jury find that the drilling of the well in question was stopped in December, 1866, by James P. Tanner's agent, and that in March, 1867, the derrick, engine and all fixtures were taken down and removed from the premises, and no renewal or resumption of the work took place by Tanner, Fullerton Parker had the right to regard the Tanner lease as forfeited, and to re-lease it to other persons."

Answer: "I do not say these facts justify a forfeiture in law; they are, however, important for the jury with circumstances."

6. "The work at the well was relinquished by Tanner and his employes in November, 1866, and the well was allowed to stand idle from that time till June, 1868, and Tanner was notified in December, 1867; the derrick, engine and fixtures were taken away, and Tanner declared in December, 1867, he would have nothing more to do with it himself, but would send his son up next week, and neglected to do so and to take any steps toward a resumption of the work; Fullerton Parker was justified in re-leasing the property in June, 1868, and even sooner if he had thought proper to do so."

Answer. "If all the facts in this point are true, it is for the jury to say whether there was such abandonment. This is for the jury, and is a question for the jury."

7. "The action of ejectment being in the nature of a bill of equity, before the plaintiff would be entitled to recover the jury must be satisfied that James P. Tanner performed his contract to prosecute with diligence the drilling of the well, and the jury will say whether the stopping of all work in November, 1866, and suffering the well to remain idle from that time until Mr. Parker took possession of the well in June, 1868, was not an unreasonable delay. Sitting as a chancellor, the judge is entitled to express his opinion on the facts, and therefore to say that specific execution of the contract under all circumstances ought not and can not be enforced."

Answer: "I do not view this case as a bill in chancery. It is a proceeding to recover a forfeiture on condition broken, and is a proceeding at law. It is therefore answered in the negative."

The court further charged:

* * * "The lease of the 7th March, 1866, is relied upon by the plaintiff as establishing her right of possession. Without going into an analysis of its terms, being, as it is, a question of law, [the conclusion the court has come to in the construction is, that it is the grant of a corporeal right, not only to the oil and mineral, but also to the surface of the premises described, as necessarily incident to the working and enjoyment of the main object of the grant. Without the right to the possession of the surface, the mineral could not be reached; and being, therefore, an exclusive right to the possession, inseparably connected with the occupation and

enjoyment, and being a purchase of the lease held for a valuable consideration of $500, and rents for the term of fifty years, we deem it such a corporeal right to the occupancy of the premises as will sustain an action of ejectment; and we also think that it is a purchase and sale of an estate for years for a valuable consideration, incumbered with a rent-charge, or a rent in the nature of a rent-charge, with a clause of forfeiture upon a contingency. Such is the construction the court have put upon that agreement or lease; and if the terms of it were complied with in its tenor and spirit, the plaintiff must be entitled to recover.] This disposes of the question raised by the defendants' counsel as to the nature and character of the estate, and the rights, whether corporeal or incorporeal, contemplated by the lease, and also answers the position of the defendants' counsel, that ejectment can not be sustained. In a word, we decide that the estate was corporeal and ejectment the proper remedy." * * *

"In the succeeding spring of 1868, a bill was filed against Mr. Tanner, in bankruptcy, which continued till February, 1869, when the proceedings were dismissed. I do not look upon this as being very material or controlling, as it was followed so shortly afterward by a lease to Karns & Co., of the 25th June, 1868. From that time the defendants, by their own act, entered and prevented further prosecution of the work by the plaintiff, Mr. Tanner, and they were estopped from further objections.

"How stands the matter? [I do not think that the mere lapse of time in this case affords a sufficient ground of forfeiture.] A forfeiture is not incurred upon slight circumstances, but requires evidence of sufficient grounds and made out by clear and satisfactory means.

"[But although the mere lapse of time was in my opinion not sufficient to warrant a declaration of forfeiture or seizure of the premises, still if aided and strengthened by the acts and declarations of the tenant, Tanner, evincing an intention permanently to abandon, or to do so for any unreasonable time, it would justify the entry and forfeiture in proportion to the established facts and circumstances of abandonment. Of this the jury are the judges. There is therefore but one question for the jury: Were there such acts and circumstances,

or such unreasonable delay manifesting an abandonment, as justified an entry by Parker, and declaration of forfeiture. If the jury think so, the plaintiff can not recover, but if not, the verdict should be for the plaintiff."]

The verdict was for the plaintiff, and the defendants took out a writ of error.

They assigned for error:

1. The rejection of Fullerton Parker.

2. Rejecting the offer to prove the reasons given by Homer for discharging Morgan.

3, 4, 5 and 6. The answers to the defendants' points.

7, 8 and 9. The parts of the charge in brackets.

S. A. PURVIANCE (with whom was J. BOGGS), for plaintiffs in error. It was for the jury to determine whether the time was sufficient to establish an abandonment: *Youst* v. *Martin*, 3 S. & R. 429. Forfeiture ensues on condition broken; Bacon's Abr. Condition, 307–317; *Hamilton* v. *Elliott*, 5 S. & R. 375; *Walls* v. *Hartley*, 7 Wend. 210; *Verplank* v. *Wylet*, 28 Id. 506; *Coldren* v. *Brownwelt*, 1 Johns. R. 287; Coke Litt. 215. Entry is not necessary: *Sheaffer* v. *Sheaffer*, 1 Wright, 525; *Davis* v. *Moss*, 2 Id. 346. As to what constitutes a condition: *Bear* v. *Whisler*, 7 Watts, 144; *Westenberger* v. *Reist*, 1 Harris, 596; *Funk* v. *Haldeman*, 3 P. F. Smith, 229. A lessee out of possession must show performance of all his covenants: *Kreutz* v. *McKnight*, 3 P. F. Smith, 319; Sugden on Vendors, 246; *Youst* v. *Martin*, 3 S. & R. 429; *Peebles* v. *Reading*, 8 Id. 484. As to the rejection of Parker: Act of April 9, 1870, Pamph. L. 1605.

E. S. GOLDEN and W. F. JOHNSTON (with whom was J. B. NEALE), for defendant in error, referred to Act of April 15, 1869, § 1, Pamph. L. 30, Purd. 1566, pl. 1. Parker was the legal assignor of the plaintiff: 2 Black. Com. 3271; Bouv. L. Dict. 133; Act of April 26, 1850, § 4, Pamph. L. 591, Purd. 366, pl. 13; Act of 1870, *supra*. The declarations of an agent out of the scope of his agency can not affect the principal: *Eakman* v. *Sheaffer*, 12 Wright, 176. Tanner's rights vested on the execution of the lease: *Bortz* v. *Bortz*, 12 Wright, 382. The estate was a corporeal interest: *Caldwell* v. *Fulton*, 7 Casey, 475; *Hill* v. *Hill*, 7 Wright, 521; *Chicago and Alle-*

gheny O. and M. Co. v. *U. S. Petroleum Co.*, 7 P. F. Smith, 83; *Law* v. *Patterson*, 1 W. & S. 184; *McMahan* v. *McMahan*, 1 Harris, 383; *Doe* v. *Bird*, 11 East, 49; Tyler on Ejectment, 37, 39, 41, 42; *Rex* v. *Alresford*, 1 Term R. 358; *Nichols* v. *Lewis*, 15 Conn. 137; Adams on Ejectment, 19, 22; *Ward* v. *Petifer*, Cro. Car. 362; *Wheeler* v. *Toulson*, Hardress, 330. The question whether the lease was forfeited was properly submitted to the jury: *Youst* v. *Martin*, 3 S. & R. 429; *Gratz* v. *Beates*, 9 Wright, 495; *Railroad* v. *Hagan*, 11 Id. 248. The whole charge and the answers are to be taken together: *Pierce* v. *Cloud*, 6 Wright, 102; *Oakland Railway* v. *Fielding*, 12 Id. 321. Forfeitures are odious and may be waived by silence; when waived they can not again be asserted: *Sharon Iron Co.* v. *Erie City*, 5 Wright, 342; *McKnight* v. *Kreutz*, 1 P. F. Smith, 233; *Lycoming Ins. Co.* v. *Schollenberger*, 8 Wright, 259; *Heil* v. *Strong*, Id. 265. The forfeiture must be claimed at the time it occurs; there must be no indulgence: *Forsyth* v. *Oil Co.*, 3 P. F. Smith, 168; 18 Viner's Abr. 482; Bacon's Abr. Rent, H.; Com. Dig. Rent, D 5; *McCormick* v. *Connell*, 6 S. & R. 151; *Newman* v. *Rutter*, 8 Watts, 51. The burden to prove a forfeiture was on defendants: *Peachy* v. *Somerset*, 1 Strange, 447; *Livingston* v. *Tompkins*, 4 Johns. Ch. 433; 1 Mitford Eq. Pl. 186; Wigram on Discovery, § 130; 1 Maddock's Ch. Pr. 173–4; 2 Story's Eq. Jur., § 1494; *Wrottesley* v. *Bendish*, 3 P. Wms. 238.

The opinion of the court was delivered, January 3, 1871, by AGNEW, J.

By an agreement of March 7, 1861, Fullerton Parker sold and conveyed to James P. Tanner, his heirs and *assigns*, all the oil and mineral rights and privileges to, on, in and under a certain parcel of land, for the consideration of $500, reserving one fourth of all the oil to be obtained, and binding Tanner, under the penalty of a forfeiture of the lease, to commence operations within one year, and prosecute the same with reasonable diligence—the lease to continue for a term of fifty years. Tanner paid the consideration, and began operations in a few weeks after the date of the lease, and sunk an oil well to the depth of 830 feet, expending for fixtures, en-

gine, tools, labor, etc., about $4,000. The well was pumped, but seemed to be unsuccessful. This was done within the first year. Tanner became embarrassed and operations ceased. The engine, fixtures, etc., were removed by Homer (who drilled the well) in the spring of 1867. The premises then remained without further operations by Tanner until the 25th of June, 1868, when Fullerton Parker, believing Tanner's lease forfeited, leased the same premises to the Messrs. Karns & Co., parties to this suit. They entered into possession, drilled the well 30 feet deeper and obtained oil. Tanner was stricken with paralysis about a week after the second lease, and remained unfit for business till he died, on the 13th of April, 1869. This ejectment was brought by Tanner a few weeks before his death against Fullerton Parker and Messrs. Karns & Co., his lessees. After Tanner's death a sheriff's sale of his interests in the lease took place, and it was bought by Mrs. Frances E. Tanner, who was then substituted as plaintiff in this action. The main question on the trial was the alleged abandonment of the lease by Tanner and its forfeiture, on the ground that he had ceased to prosecute operations with diligence. The plaintiff, among other things, proved a conversation between Tanner and Parker in December, 1867, to show that Tanner had not abandoned. On the part of the defense Fullerton Parker was called as a witness to rebut the plantiff's case and was objected to, and was rejected by the court as incompetent. This is the chief question in the cause and involves the true meaning of the first section of the act of 15th April, 1869, allowing parties interested to be witnesses. The act reads thus: "No interest or policy of law shall exclude a party or person from being a witness in any civil proceeding: Provided, this act shall not alter the law as now declared and practiced in the courts of this Commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his client; and this act shall not apply to actions by or against executors, administrators or guardians, nor where the *assignor* of the *thing* or *contract in action* may be dead, excepting in issues and inquiries *devisavit vel non*, and others respecting the right of such deceased owner between parties claiming such right by devolution on the death of such owner."

The judge below held that Fullerton Parker was incompetent to testify under that clause of the proviso which declared that the act shall not apply "where the *assignor* of the *thing* or *contract in action* may be *dead*." This clause contemplates two things; the first, that the deceased party shall be the *assignor* of a thing or contract; the second, that this thing or contract shall be the subject of action. In a precise sense then, James P. Tanner, the deceased lessee of the premises, is not the assignor of Frances E. Tanner, for he was dead before his title passed; and it passed by a sheriff's sale by act of the law. He therefore did not assign. Again, the thing in action is the right to the possession of the premises leased, this being an action of ejectment, and the contract under which this right arises is the lease from Parker to Tanner. In that lease Parker is the lessor, and may be said to be the assignor to Tanner of the thing in action, and Parker is alive. As assignor to Tanner, he seems literally not to be within the prohibition of the proviso. But is this the true meaning of the proviso? We think not. In giving to this law a proper interpretation we must recur to the evil intended to be remedied. *Post* v. *Avery*, 5 W. & S. 509, overturning *Steele* v. *Phœnix Ins. Co.*, 3 Binn. 306, established the rule that a party making an assignment of his interest in the subject of the suit, to enable himself to testify for his assignee, is incompetent as a witness. This was confined to assignments termed merely colorable; but it led the way to a vast train of decisions, some of which went beyond the original case.

Thus in *Graves* v. *Griffin*, 7 Harris, 176, a party to a contract, not the note in suit, and he not a party to the action, assigned his interest in the contract and was then offered by the defendants to prove that the plaintiffs had agreed that the note in suit should be applied in payment of his contract. It was held that by the doctrine of *Post* v. *Avery* and its successors, he was incompetent. WOODWARD, J., saying, "though not a party to the record, he should have been excluded, whether his assignment was real or fictitious." So it was held in *Irwin* v. *Shumaker*, 4 Barr, 199, that a co-defendant who was a certificated bankrupt as to whom a *nolle prosequi* was entered, and who executed a release of any surplus

to his assignees in bankruptcy, was incompetent on the score of policy. Other cases lie in these lines of decision, and hence it was said in *Cambria Iron Co.* v. *Tomb*, 12 Wright, 394, that a party to the record is incompetent as a witness on the ground of policy, has become too firmly fixed to be changed as a rule of practice, except by legislation. Many attempts were made to apply this remedy, but all failed until the act of 1869 was passed. That act laid the axe to the root of the evil, by declaring that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding. This is sweeping language, and was intended to reach every imaginable case. But the legislature knew that there were some exceptions that must be allowed, otherwise the law could not stand; for it would run counter to interests so sacred and a policy so clear, that public sentiment would not tolerate their sacrifice. The proviso therefore followed, which was evidently the product of two thoughts, one that there were certain confidential relations to be protected against compulsory disclosure, the other that there were certain cases of inequality where it would be unjust to open a door to one party, that was closed by necessity against the other. Hence the proviso declared that husband and wife should not be permitted to testify against each other; nor counsel to testify to the confidential communications of his client. This belongs to the first thought, the confidential relation. It then declared that the act should not apply to actions by or against executors, administrators or guardians, nor where the assignor of the thing or contract in action may be dead. This evidently came from the second thought, as to the inequality of the parties. Where one of two parties to a transaction is dead, the survivor and the party representing the deceased party stand on an unequal footing as to a knowledge of the transaction occurring in the life-time of the deceased. The enacting clause had opened the lips of all parties, but when death came it closed the lips of one, and even-handed justice required the mouths of both to be sealed. In regard to one class we easily comprehend that a survivor ought not to be permitted to testify against the executor or administrator of his adversary, but as to the other class in the same clause we do not so readily perceive what *assignor* it is who, being dead,

the proviso closes the mouth of the survivor. Evidently it is the true purpose of the proviso to close the mouth of him who is adversary to the deceased assignor. Here the current of former decisions tends to elucidate the meaning of the legislature. If, therefore, the holder of a note, bond or other contract should assign his interest to another, he was held to be incompetent to support the claim by his testimony against the opposite party in the instrument or contract. Hence, although he had been stripped of all apparent interest by his assignment or by the operation of the bankrupt law, yet he could not testify against the adverse party. One of the reasons given by WOODWARD, J., in *Graves* v. *Griffin*, *supra*, is, that whilst one of the parties to a contract in litigation is denied the privilege of testifying, the policy of the law is to close the mouth of the other, and this whether it relates to a claim of a plaintiff, or a set-off of a defendant. The true spirit of the proviso then seems to be that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or by that of the law, to another who represents his interest in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the life-time of the adverse party, whose lips are now closed.

This intent is gathered also from the coupling of the provision for the assignor who is dead, with the provision for the case of an executor or administrator, evidencing that the legislature looked upon both cases as precisely alike. Another clue to the meaning is found in the exception to the proviso found in the last clause; excepting all "issues and inquiries of *devisavit vel non* and others respecting the right of such deceased owner between parties claiming such right by devolution on the death of such owner." Thus parties claiming under the same decedent, by the mere operation of the law devolving the estate upon them, as by descent or succession, are exempted from the prohibition of the proviso, in contrast to those who stand in adversary relation by reason of a subject of contract, one side of which has come from one of the original parties to the disputed subject.

The true intent of the legislature is further developed by the act of 9th April, 1870, declaring "that in all actions or civil proceedings in any of the courts of this Commonwealth, brought

by or against executors, administrators or guardians, or in actions where the assignor of the thing or contract in action may be dead, no interest or policy of law shall exclude any party to the record from testifying to matters occurring since the death of the person whose estate, through a legal representative, is a party to the record." Here the terms "since the death of the person whose estate, *through a legal representative*, is a party to the record," are striking, for both classes are linked together in the same clause, and the terms *through a legal representative*, applied to the case of a deceased assignor as well as to the case of an executor or administrator, evincing the intention of the legislature not to confine the term assignor to one who has by his own act merely transferred his title, but rather to treat the correlative term assignee, just as the term assignees is oftentimes used, in a broad sense, including any one taking title by a sheriff's sale, an orphan's court sale, or even a devise under a will. Thus, in the present case, though Tanner died without making an assignment himself, yet he and Parker were the parties to the contest arising upon the lease, a contest now between Mrs. Tanner and Karns & Co. Mrs. Tanner now represents that side of the controversy which her deceased husband, and predecessor in the title, once represented. Parker is the survivor of the parties to that controversy, and liable to his second lessees on his covenants in his lease, as well as entitled to one eighth of the oil to be derived from it. If he be admitted to testify to matters occurring in the life-time of Tanner, between him and Tanner, it is obvious the very case in the view of the legislature would arise, and he would hold a position of advantage which would be unfair to Mrs. Tanner, who knows nothing of the transactions between them, and must therefore suffer from any one-sided narration he might give. We think the court committed no error in excluding Parker as a witness.

The remaining assignments of error need no extended notice. The court properly rejected Homer's declarations, so far as they were offered to impute to Tanner an intention to abandon the lease. Homer was only employed to operate for oil, and no authority beyond this was shown. Having drilled 830 feet and pumped unsuccessfully, he might well suppose the prospect of finding oil bad, and quit work and discharge

the hands. But this gave him no authority to commit Tanner to an abandonment of his lease. Tanner had paid $500 for the lease, and though not willing to operate further himself, and might even sell his engine, derrick and tools, and yet be desirous of selling out to assigns, as the terms of the lease permitted, or of operating through an under tenant, who would supply the machinery, etc. Having expended $4,500 in the undertaking, it is not very probable he would abandon the lease voluntarily and lose everything. Now without very clear authority to Homer to commit him to such an abandonment, the evidence of Homer's declarations would be clearly incompetent.

In regard to the forfeiture, as the work had been begun promptly and prosecuted diligently, at great expense, to the depth of 830 feet, and as the whole question as put to the jury was one of due diligence after that, and depended on a variety of circumstances, it was clearly one of fact for the jury. Abandonment of the lease was a question of intention, and was to be determined only on an investigation of facts. The court was right, therefore, in submitting it to them.

The other question, whether ejectment was the proper remedy, was placed, in the argument, upon the ground that the right conferred by the lease was incorporeal, and not the subject of this action. But the question as to the nature of the interest vested by the lease is not necessary to the decision of the right to maintain ejectment in this case. This is an action brought for wrongful ouster from actual possession, as it is alleged.

By the terms of the lease Tanner was entitled not only to the right of boring for oil and mining, but "to hold, *occupy, use and enjoy* with this right, and also the right of way, the rights and privileges for the purpose of prospecting, boring, mining, drifting or otherwise operating for oil, coal and other minerals," and with the further right "to erect and maintain all buildings and machinery necessary and convenient therefor, and to renew the same at pleasure." Now in order to bore for oil and to pump and take the oil, it is well understood that the party must have the actual possession of so much land as is necessary for his engine house, derrick, tanks and machinery, and to operate them conveniently; and this posses-

sion must continue so long as the party draws oil from the well. The evidence is clear that Tanner had gone into actual possession under the lease, and had been operating there. If his lease had not been forfeited, it is clear that the entry on him by Parker's second lessees was wrongful. It was in just such a case, and under a writing that was clearly nothing but a license, it was stated by Justice STRONG as the opinion of the court in *Dark* v. *Johnston*, 5 P. F. Smith, 170, that an entry upon the tenant was unlawful, and we should feel ourselves justified in sustaining an ejectment to restore a possession unlawfully taken away. The authorities cited by the defendant in error lead in the same direction. The possession taken under the lease was actual though qualified, but still essential to prosecute the purposes of the lease, and when given to effectuate even incorporeal rights, is still a substantial possession, and therefore the proper subject of this remedy by ejectment; otherwise a party might be actually ejected from a valuable oil well or mine, with no remedy for the injury but the unsatisfactory valuation of a jury of his damages for rights prospective as well as present. Possession to a qualified extent is essential to the enjoyment of his rights, and the law therefore must restore him to his actual place on the land, and this can be done only by an ejectment.

Upon the whole case, finding no error, the judgment is

Affirmed.

HERBERT v. KING ET AL.

(1 Montana, 475. Supreme Court, 1872.)

Necessary proof. In ejectment the plaintiff must prove, first, title in himself, or the right to the immediate possession at the time of instituting the suit, and second, that possession was unlawfully withheld by defendant at the time.

Practice on appeal from judgment of nonsuit. In considering the correctness of the ruling of the court below in granting a nonsuit, this court will consider as proven, every fact which the evidence tended to prove.

[1] **Mining superintendent—Declarations.** The acts of a mining superintendent of a flume, in constructing, repairing and superintending the

[1] *Karns* v. *Tanner*, 5 M. R. 89.

same, are binding upon the principal, but such authority does not make his acts and declarations in respect to title admissible to affect his principal.

Appeal from the District Court of Jefferson County, First Judicial District.

In October, 1871, the court, MURPHY, J., sustained the motion of King et al. for a nonsuit, and plaintiff appealed

SHOBER & LOWRY and G. G. SYMES, for appellant.

CHUMASERO & CHADWICK and E. W. TOOLE, for respondents.

WADE, C. J.

This is an appeal from a judgment of nonsuit in the court below, and the question herein presented is whether or not the nonsuit was properly entered.

The action is a suit in ejectment to recover possession of certain mining claims in Baker district, Confederate gulch, in the county of Meagher, embracing three hundred and ninety linear feet of said gulch.

The complaint sets up title in the plaintiff, the right to immediate possession, and the possession of the defendants at the commencement of the suit. The answer denies the title of the plaintiff, denies his possession and the right thereof, and denies possession of defendants, and disclaims all right, title and possession by defendants to the grounds in dispute.

The case was argued upon the hypothesis that the pleadings admitted the ownership of the plaintiff, but such is not the case. The amended answer denies that plaintiff is entitled to the possession, and avers that whatever right the plaintiff had in the ground had been abandoned and forfeited by him, and lost under and by virtue of the usages and customs of the district where the ground was situated, so that no presumption can arise upon the supposed fact that plaintiff was and is the owner of the ground. By the pleadings, title is one of the questions in issue by virtue of the averment of forfeiture.

In order to maintain the action of ejectment, the plaintiff

must prove, first, title in himself, or the right to the immediate possession at the time of instituting the suit. This right must exist at the time the suit is brought; a right prior or subsequent to that time will not avail; and second, he must prove that possession was unlawfully withheld by defendant at the time. A failure to prove either of these essential elements will defeat the action of ejectment, and if there is no proof to support a necessary and vital averment of the complaint, a nonsuit would be properly granted.

It seems by the pleadings and proofs in this case, that on the 9th day of March, 1868, the plaintiff was the owner of and in the possession of the mining ground in dispute, and on that day the plaintiff, and defendants King and Gillette, entered into a contract in writing concerning said ground, whereby said plaintiff agreed to deliver possession of the ground to said defendants for the purpose of having the same drained and the gold extracted therefrom, the plaintiff to receive one half the gold so extracted. King and Gillette were at that time constructing a flume for mining purposes, and the agreement so made between the parties was to be null and void providing said flume did not strike bed-rock at the lower end of said ground, and it was further agreed that King and Gillette should represent the ground until the fulfillment of the contract.

In pursuance of this agreement, King and Gillette entered into possession of said ground and continued to construct their flume until, some time in the summer of 1868, they had reached the lower end of said ground with the flume, and it is admitted that it did not strike bed-rock at that point.

Immediately after it was found that the flume failed to strike bed-rock, the plaintiff was notified of the fact, for we find that in September, 1868, he made arrangements with one Leonard to represent the ground, the contract of King and Gillette to represent it having expired upon the failure to reach bed-rock, and they having ceased to represent the ground at that time. It further appears from the testimony that for a month or two after King and Gillette ceased to represent the ground by reason of having failed to strike bed-rock with their flume, the ground was unrepresented, and thereby became subject to relocation by any party who

desired to take it up and occupy it. This failure to represent the ground, the testimony shows, forfeited the plaintiff's right to it, and it became subject to relocation like any other parcel of the public domain. If this alleged forfeiture was caused by any wrongful act of King and Gillette, undoubtedly they would be liable in damages therefor, but we have nothing to determine now as to that question.

It further appears by the proof, that this ground being vacant and subject to relocation and entry, was taken up and located by Harwood, Simms and Clarke on the 16th of November, 1868, and was subsequently mined and worked out by them.

The ground could not be worked except through the flume of defendants, and the parties who relocated the ground purchased the right to work two hundred and twenty feet thereof through this flume by selling to King and Gillette, through their agent O'Brien, one hundred and seventy feet of said ground. At the time the ground was relocated by Harwood, Simms and Clarke, the defendants, King, Gillette and O'Brien, had no interest therein, but subsequently acquired title to one hundred and seventy feet from the relocators. It is further shown that the plaintiff was on the ground and worked there to a certain extent in November, 1868.

Thus far the proof produced by plaintiff tends directly to defeat his case, and to show that he had neither the title nor the right to the possession of the ground in controversy; but plaintiff testifies in his own behalf and says that defendants King and Gillette, and others, had possession of the ground at the time the suit was commenced, and for some time afterward, and upon this testimony the plaintiff rests his claim that the judgment of nonsuit should be reversed.

In the light of this testimony did the court err in giving judgment of nonsuit?

It is undoubtedly true that, in considering the correctness of the ruling of the court below in granting a nonsuit, this court will consider as proven every fact which the evidence tended to prove: *Cravens* v. *Dewey*, 13 Cal. 42; *Pratt* v. *Hull*, 13 Johns. 335; *Darst* v. *Rush*, 14 Cal. 82; *McKee* v.

Greene, 31 Id. 418; *Kelley* v. *Kelley*, 3 Barb. 419; *Dow* v. *Gould, etc., Mi. Co.*, 31 Cal. 650; *De Ro* v. *Cordes*, 4 Id. 117; *Labar* v. *Koplin*, 4 N. Y. 547.

Looking at the whole evidence produced by plaintiff, which is all the evidence in the case, what does it tend to prove? The weight of it overwhelmingly preponderates against the plaintiff. It tends directly to show that the right of the plaintiff to the ground in question had been forfeited; that third parties had acquired the title thereto, and by virtue of the title so acquired had mined and worked out the ground. It is true that the plaintiff testifies that the defendants had possession of the ground at the time of the commencement of this action; but having, by his own testimony, shown that the ground had been forfeited, and that title thereto had been acquired by third persons long before the suit was commenced, and that the ground had been fully worked out, such testimony is like swearing against a deed or a record. It does not even raise a presumption; and if a verdict had been rendered for the plaintiff upon the testimony produced in this case, the court, undoubtedly, would have been compelled to set it aside upon the ground that there was no substantial evidence to support it. But it is not necessary to determine the case upon the testimony produced, as to defendants being in possession. It will be remembered that the plaintiff must show affirmatively that he is entitled to the possession. There is no affirmative proof of the kind, but, on the contrary the proof all tends to show that third parties had acquired the title and the right to the possession, and that the plaintiff had entirely lost his right to the possession. Instead of showing title and the right of possession in the plaintiff, the proof tends directly to show that right in Harwood, Simms and Clarke.

There is much doubt as to the competency of the proof by which this alleged forfeiture was proven. The local laws of the district, if there are any, upon the subject of mining, were not produced and proven in evidence, neither were the customs, usages and rules of the district shown; but the plaintiff produces testimony tending to show that the mining ground in question was unrepresented for five or six weeks, and that it thereby became subject to relocation; that this

failure to represent the ground forfeited the right of plaintiff therein, as well as that of the defendants, if they had any right thereto; and that the ground, being subject to relocation, was taken up by Harwood, Simms and Clarke. This proof was produced by plaintiff. The men who relocated the ground worked it out after selling one hundred and seventy feet to King and Gillette, and the plaintiff made no objection thereto. If he had not forfeited the ground he could have enjoyed their working it; but this proof, such as it is, being called out by the plaintiff, and being against his interest, we are inclined to take it as true, and to say therefrom that the ground became forfeited and subject to relocation in November, 1868. It is certain by the proof that the ground was relocated, and was worked out by the relocators unmolested, and with the knowledge of the plaintiff, and that he never asserted any title thereto; and these facts alone raise a strong presumption that they had a right, by the laws of the district, to relocate and work it, and we believe we are justified by the proof in saying that the ground was abandoned by plaintiff after King and Gillette ceased to represent it.

There is no proof whatever that the plaintiff was entitled to the possession of the ground at the commencement of the suit. The only proof on the subject is the bare presumption that, because the plaintiff was owner in 1868, therefore he was entitled to the possession in 1870, when the suit was commenced. This, indeed, is a violent presumption, when taken in connection with plaintiff's acts, in permitting the ground to be relocated and worked by third persons, with his knowledge and consent, before the action was brought.

2. Did the court err in striking out the declarations of O'Brien? O'Brien was agent for King and Gillette in superintending their flume, and any declarations made by him, within the scope of his authority, would bind his principals. The extent of the power of an agent to bind his principal is a question of law for the court.

If an agent, when acting *within the scope of his authority*, perpetrates a fraud or wrong on another, or occasions a consequential injury, the principal is liable: Sto. on Agency, §§ 452, 453, 308; 2 Greenl., § 68; *Foster* v. *Essex Bank*, 17 Mass.

479–507; *Williams* v. *Mitchell*, Id. 98; *Schieffelin* v. *Harvey*, 6 Johns. 170; 1 Pars. on Cont., 73, 74.

But, where the principal is thus held liable, the agent must have acted strictly within the scope of his authority, so as to make the agent's acts the acts of the principal; and courts will not tolerate any enlargement of this liability, but it must be confined to acts strictly within the scope of the authority conferred.

O'Brien's authority was the authority of a flume superintendent, and any of his acts necessary to the construction repairing or superintending the flume, would bind his principal, but the acts and declarations sought to be introduced had no possible connection with the flume. They were entirely foreign to his authority as agent, and could in no manner bind his principal, and were properly excluded.

Judgment affirmed.

MURPHY, J., concurred.

KNOWLES, J., dissenting.—I agree to that part of the decision striking out declarations of O'Brien, but think there was evidence enough to have warranted the jury in finding that King and Gillette were in possession of the upper one hundred and seventy feet of the ground in dispute, and that the jury might have found against them for that ground, without damages, although I am far from holding that I would have found thus had I been the jury.

SCHISSLER ET AL. v. CHESSHIRE ET AL.

(7 Nevada, 427. Supreme Court, 1872.)

[1] **Treating jury to liquor during inspection of mine—Verdict.** Upon the return of the jury from viewing a mine, in company with the sheriff and two persons appointed by the court, at the instance of the plaintiffs and defendants respectively, to point out the premises and explain the controversy, the one appointed at the instance of the prevailing suitors treated the party to liquor: *Held*, that his interest in the controversy was not of such a character as to vitiate the verdict.

Instruction upon points not involved. Where in a suit for the recovery of a mine upon the public domain, the plaintiff requested the court to

[1] 1 Nev. 405; 6 Id. 291; 7 Id. 408.

charge "that the doctrine that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case; the real question here involved is, which of the parties, the plaintiffs or defendants, have the better right to mine the land in question;" and it was claimed that without it the jury might have presumed the title to be in the United States, and therefore found against the plaintiff, but no suggestion on such point appeared to have been made to the jury on the trial. *Held*, that the refusal of the instruction was not error.

Appeal from the District Court of the Eighth Judicial District, White Pine County.

The facts are stated in the opinion.

HILLHOUSE & TILFORD, and D. R. ASHLEY, for appellants.

HARRY I. THORNTON, and C. H. BELKNAP, for respondents.

By the Court, LEWIS, C. J.:

The appellants having obtained a verdict in this cause, the learned judge below set it aside, upon a showing, as it is supposed, that improper civilities had been shown to the jury by Mr. Tagliabue, one of the witnesses, and, as it is claimed, an agent for the appellant. It appears that it became necessary for the jury to go upon the mining claim in controversy for the purpose of familiarizing themselves with certain locations and situations in question in the case.

To this end it was agreed that each party should designate a person to be appointed by the court to accompany the jury, for the purpose, as stated by the judge below, of pointing out to them the points in regard to which testimony would be given at the trial. The appellants designated for this purpose Mr. Tagliabue. He, with the person appointed by the respondent, together with the sheriff, accompanied the jury to the ground, where the proper explanations were made. On their return, the coach, occupied by Tagliabue and some of the jurors, stopped at a public house, and he invited them to alight and take a drink of liquor with him at the public bar. Several of the jurors accepted his invitation and drank with him. Further than this, nothing of an improper character appears to have taken place. Tegliabue had, prior to the trial, been employed by the appellants to make a map of the mine, and

they had designated him as the person whom they desired the court to appoint to accompany the jury, as already stated. Beyond this he does not seem to have had any relations with the appellants, nor interest of any kind in the suit. It does not appear that he was called as a witness even, except to the one point of identifying the map made by him. But considering him to be an agent or representative of the appellants, the consequences of his civilities to the jury were for that reason held to be chargeable upon them, and it was thought the case came within the rule announced in *Sacramento & M. M. Co.* v. *Showers*, 6 Nev. 291.

It is very clear to us, however, that the facts of this do not bring it within the rule of that case. If Tagliabue were an agent, managing the suit, or if he had any interest in the controversy with the appellant, undoubtedly that would bring the case within the rule of that referred to. But nothing of the kind appears. For aught that is shown in this record, Tagliabue was no more interested in having a verdict rendered in favor of the appellants than of the respondents. That he had been employed to make a map of the mine for appellants, certainly indicates no interest in favor of them. He may have done that, and still continued utterly indifferent between the parties, or even been interested against the appellants; and that, too, was an employment which had been completed before the suit. His selection by them to accompany the jury to the ground, which was simply for the purpose of "pointing out the points respecting which testimony was to be introduced," surely does not indicate any interest on his part in favor of appellants. He may have been selected for that purpose, although entirely indifferent. Nothing could be presumed from such selection, except perhaps that he was familiar with the ground in controversy.

Indeed, there is nothing here inconsistent with entire impartiality or indifference on the part of Tagliabue; and the presumption is, nothing to the contrary appearing, that he was so. As is very well said by counsel for appellants, "His employment to make the map no more constituted him an agent in the action than the employment of a physician, who may afterward be called upon to testify respecting the disease of his patient, could be considered such." And as to

his selection to accompany the jury to the mine, which, it must be remembered, was only for the purpose of designating certain points about which testimony was to be offered, that no more constituted him the agent of the appellants than of the respondents. His authority and appointment for that purpose were derived from the court, the appellants simply designating him as the person whom they desired to have the court appoint. It seems to us that the very meager connection which Tagliabue had with this case is not sufficient to bring it within the rule of *Sacramento & M. M. Co.* v. *Showers.*

The reason of that rule is stated to be, to prevent the jury from being tempted to find a verdict against the unbiased sense of the right of the case, by motives of gratitude or of feelings for favors, however slight. Now, how could the treating of the jury in this case have any such influence, when it really does not appear that they had any reason to believe that Tagliabue had any interest as to how the verdict might be rendered? If they had no more from which to judge of that fact than we have, they could only have concluded that he was entirely indifferent, and therefore any civilities from him could not in any way have influenced their verdict one way or the other. It would be the same as if an entire stranger had done the same thing. We can not see that the facts detailed in the record bring this case within either the letter or the spirit of the rule in *Sacramento & M. M. Co.* v. *Showers*, nor that the civility shown to the jury by Tagliabue can be considered such irregularity as will authorize a disturbance of the verdict.

The other ground upon which counsel for respondents endeavor to sustain the order, is equally untenable. It was based upon the refusal of the court to instruct the jury that the "doctrine that the plaintiff must recover upon the strengh of his own title, and not upon the weakness of that of the defendant, has no application in this case. The real question here involved is, which of the parties, the plaintiff or defendant, has the better right to mine the land in question." The manner in which it was supposed the refusal of this instruction prejudiced this respondent is, that without it the jury might have presumed the title to be in the gov-

ernment, and upon that ground found against the plaintiff; and to guard against such result alone it seems to have been asked. Had the jury relied upon any such presumption, they would have relied upon a point which does not appear to have been in any way suggested in the case, and furthermore, against the whole theory of the trial, and the instructions given by the court. Among many others of a similar character, they were charged that if they believed from the evidence that the predecessors of plaintiffs posted the notice of the Burning Moscow claim at the point marked, the initial point on plaintiffs' map, on the twenty-third day of December, A. D. 1868, and did two days' work at the point called Burning Moscow shaft on plaintiffs' map, prior to the sixth day of January, 1869, and filed the notice of location in the district recorder's office on the twenty-third day of December, 1868, and that plaintiffs and their predecessors have done two days' work on said claim within each year after the twenty-third day of December, 1868, they must find a verdict for the plaintiff." How, with such an instruction given to them, could the jury have come to the conclusion that the plaintiff could not recover if the legal title was in the United States, or that it was necessary for him to prove more than they were here told was sufficient to entitle him to recover? We can not suppose that the jury found a verdict against the plaintiff upon a ground not suggested in the case, and that, too, contrary to the whole theory of the case, and the instructions given to them by the court. To protect him from such possibility, it would appear unnecessary, therefore, to charge that it was not necessary that the plaintiff should recover upon the strength of his own title, for without it it would appear impossible to suppose that the jury could have found against the plaintiff upon that ground.

Indeed the jury are over and over again charged, in effect, that they should find a verdict in favor of him who had the better right to mine the ground in controversy, which clearly shows that the absolute legal title was in no way involved. And the question of the real rights of the parties was fully and clearly submitted to the jury, so that the latter portion of the instructions refused were substantially given in several instructions, and so clearly that there could be no mistake about it. Thus the first clause of the instruction was unnec-

essary for the purpose claimed by counsel, and the second was substantially given. There was, therefore, no prejudicial error, even if the instructions given were technically correct.

Not only was it useless to give it, but its direct effect would have been to mislead the jury. Upon this point what is said by the district judge, in his opinion, very satisfactorily disposes of it. "It may be true," he says, "that in the case of unpatented mines, the ultimate title is in the government. But the presumption is that the title is in the occupant; a presumption which courts will not allow to be rebutted by showing title in the government, which they sustain by the fiction of a supposed grant. But besides that, this is the theory upon which these actions have constantly been maintained; the object of instructions is to instruct the jury, and not to mystify them; but I think the only effect of giving the instruction asked would have been to confuse the jurors. The right of a man to mine on a particular vein of ore in this country, gained by compliance with the mining laws, which, by adoption, are a part of the law of the land, is not only popularly regarded as a title to the ground, but is so designated in acts of Congress, of the State legislature, and in the opinions of courts. In fact it is a sort of title; and though not a perfect or complete title, is the only one we have ordinarily to deal with, and the use or sense of the word employed in connection with these cases can never be misunderstood, or tend in the slightest degree to mislead the jury."

The rights acquired simply by priority of occupation being so generally called a title, and so recognized, as stated by the judge, and there being no possible ground for apprehension that the jury would find against the plaintiff, simply because the real title was in the government, the instruction was only calculated to confuse them, without the possibility of doing any good. Its refusal was, therefore, not error.

The order granting a new trial must be reversed. It is so ordered.

GARBER, J., having been counsel in the court below, did not participate in the foregoing decision.

SAN FELIPE MINING CO. ET AL. v. BELSHAW ET AL

(49 California, 655. Supreme Court, 1875.

[1]**A corporation holding an agreement for a deed can not maintain ejectment.** An agreement in writing by the owners of mining ground to incorporate and convey their several interests to the company, in pursuance of which the corporation is formed, will not vest the title in the company so as to enable it to bring ejectment for a portion of the ground, the title to which stands in the name of an incorporator who dies before executing a conveyance to the company.

Appeal from the District Court, Sixteenth Judicial District, County of Inyo.

Ejectment to recover two thousand one hundred and fifty and twenty-four one-hundredths feet undivided in a quartz lode two thousand four hundred feet in length, and damages for its detention, commenced on the 10th day of February, 1873. On the trial, the plaintiffs, in order to prove a right to the possession of an undivided interest in the San Felipe mine, deraigned from De la Mere, to wit: Seven hundred feet undivided, proved the execution of, and offered to read in evidence an agreement, of which the following is a copy. The defendants objected to the evidence on the ground that the same did not convey title, and did not divest said De la Mere of the title conceded to have been vested in him at the date of said agreement, and that ejectment could not be maintained on said agreement. The court overruled the objection and permitted the agreement to be read to the jury, to which ruling the defendants excepted.

"This covenant and agreement, made this 4th day of August, A. D. 1870, by and between the undersigned, each one respectively with the others:

"Witnesseth: That the following parties, to wit: De Gustave Wiss, now of Olancha, Inyo county, State of California, Henry W. Schmidt, George S. Mann, Alfred Wheeler, M. Allison Wheeler and John Ricketson, of San Francisco, and Enrique A. De la Mere, of Cerro Gordo, Inyo county, State of California, are the sole owners in fee simple and as tenants in common of all the property, real and personal, of the San Felipe Mining Company, said parties comprising and constituting said company.

[1]*Felger* v. *Coward*, 5 M. R. 273; *Smith* v. *Pipe*, 3 Colo. 187.

"It is also admitted, covenanted and agreed that the said company and the property aforesaid are indebted to the following individual members thereof, for advances of money in gold coin made by them heretofore in the following amounts, to wit: To Gustave Wiss, four thousand five hundred dollars; to Henry W. Schmidt, four thousand five hundred dollars; to M. Allison Wheeler, five thousand seven hundred dollars; to George T. Mann, five thousand nine hundred and eight dollars; to Alfred Wheeler, three thousand and twenty-five dollars; which said amounts, together with any other amounts which either of them shall hereafter advance or furnish to said company, together with interest thereon, at the rate of two per cent. per month from date of advance of said amounts, shall be respectively repaid in gold coin by said company or the incorporation formed, *pro rata*, from the first proceeds of the mine, or the first moneys received after the current expenses are paid—proper vouchers being presented for each respective amount so advanced.

"And it is further covenanted and agreed that the said company shall forthwith be incorporated under the laws of the State of California, with a capital stock of one million dollars, divided into one thousand shares, of the par value of one thousand dollars each.

"That the Board of Trustees shall be five in number, and the principal place of business shall be in San Francisco.

"That as soon as said company is so incorporated, the respective parties hereto, in whose names there shall be standing of record any right, title or interest in and to any of the property hereinbefore named, shall forthwith make, execute and deliver to said incorporation deeds of conveyance of such right, title and interest.

"And that the stock of said incorporation when issued shall be disposed of as follows, to wit: One hundred shares thereof shall be issued and delivered to each of the seven parties above named, which stock shall represent his interest in the property of said company.

"That the said incorporation shall also credit each of the parties aforesaid with the amount of money advanced by him as aforesaid, and shall give to him the necessary and proper obligations of the company for its repayment.

"The remaining three hundred shares of said stock shall be reserved stock, to be sold or used by the corporation for its benefit in carrying on the enterprise; but should the same not be required for such purpose within one year from the date of incorporation, then said three hundred shares, or so much thereof as shall not have been so used, shall be distributed equally between the said Wiss, Schmidt, M. A. Wheeler, George S. Mann and Alfred Wheeler.

"In witness whereof, the said parties have hereunto set their hands and seals, this fourth day of August, A. D. 1870.

"D. G. WISS, [L. S.]
"H. W. SCHMIDT, [L. S.]
"GEO. S. MANN, [L. S.]
"ALFRED WHEELER, [L. S.]
"M. ALLISON WHEELER, [L. S.]
"JOHN RICKETSON, [L. S.]
"E. A. DE LA MERE, [L. S.]"

The corporation was formed on the 8th day of August, 1870, and deeds were given to the corporation by all the parties to the agreement, except Mere, who died on the 9th day of October, 1870.

The court charged the jury that said instrument was sufficient to divest said Mere of his interest, also to vest the same in plaintiff, and to enable plaintiff to recover the same in this action, to which charge defendants excepted. The plaintiffs obtained the verdict of a jury, and had judgment for all the ground. The defendants appealed.

By the COURT:

Irrespective of other points made by the appellant, and which need not now be considered, we are of opinion that the court below erred in instructing the jury that the agreement of August 4, 1870, was sufficient in point of law to divest the interest of De la Mere and vest the same in the plaintiff, so as to enable the plaintiff to recover that interest in this action.

Judgment and order denying a new trial reversed and cause remanded. Remittitur forthwith.

Reversed.

SEARS v. TAYLOR.

(4 Colorado, 38. Supreme Court, 1877.)

Possessory title conveyed by deed. Title by occupancy is, under the Colorado statutes, an interest in real estate, and such an interest as may be the subject of conveyance by deed.

[1] **Pleading—Sufficient averments.** A general averment in a declaration, that the plaintiff, on a day specified, was in possession of the premises in question, and that afterward, on a day specified, the defendant entered thereon and unlawfully withholds possession from the plaintiff, sets out a sufficient cause of action.

Character of title declared on immaterial. In an action against a mere intruder, whose entry is without right or title, the character of the title declared on, whether in fee, or by virtue of local mining laws, or a right of possession generally, is immaterial.

[2] **Ejectment is a possessory action,** and to maintain it the defendant must be in possession, actual or constructive at the time of suit brought; and the plaintiff may recover upon proof of prior possession without other title.

[3] **Presumption from possession.** Prior possession of the plaintiff being established, he is presumed to have complied with all the requirements of the *lex loci* peculiar to that mining district, necessary to the acquisition of the title declared on.

Facts which may be proved. Under an averment of the plaintiff's ownership in fee and right to possession, at the date of the commencement of the suit, he may prove any facts which would entitle him to possession at that time.

Priority of title or possession. The plaintiff need not go back in his title further than to antedate that of the defendant.

Appeal from the District Court of Clear Creek County.

The case is stated in the opinion.

SAYER, WRIGHT & BUTLER, for appellant.

E. L. SMITH, for appellee.

STONE, J.

This was an action of ejectment brought by the appellee for the possession of a parcel of the public domain, described

[1] *Coryell* v. *Cain*, 5 M. R. 226.
[2] *Niagara Co.* v. *Bunker Hill Co.*, 59 Cal. 612.
[3] *Milsap* v. *Stone*, 2 Colo. 137.

as placer-mining ground, and which appellee claimed by right of possession.

There was a verdict and judgment, in the court below, for the plaintiff, from which the defendant appealed to this court; and error is assigned by appellant, upon exceptions to certain evidence given on behalf of appellee, at the trial, and for the giving of the following instructions to the jury by the court upon its own motion.

1. "If the plaintiff had actual possession of the premises in controversy, and the defendant entered upon them during such occupancy by the plaintiff, for the purpose of making a survey with a view to procure a government title, the plaintiff may recover."

2. "But with respect to possession and occupancy, it is to be observed that the exterior boundaries of the land claimed by the plaintiff were not marked, and therefore he can not recover more than he had improved, unless at or before the time of the alleged survey, he pointed out the boundaries of his claim to the defendant. If the plaintiff made known the boundaries of his claim to the defendant, at or before the time of the alleged survey, and he was then in the actual possession of any part of the claim, such possession should be regarded as extending to the whole claim. But if he did not point out the boundaries, his possession can not extend beyond the surface which he may have leveled, or otherwise changed in such manner that the possession was visibly marked. If you believe from the evidence that the plaintiff purchased from Skinner, he acquired thereby no right whatever which he can now assert. He must recover upon actual and visible possession of the ground, if at all; and whether he had such possession at the time of the alleged survey by defendant, and the state of his possession, you are to determine, upon the evidence, as a matter of fact and not of law."

3. "If you find for plaintiff you should describe the premises, and declare in your verdict that the plaintiff is entitled to possess and occupy them. If you find for the defendant, your verdict will be simply 'not guilty.'"

Upon the evidence, as disclosed by the record, the foregoing instructions correctly set forth the law as applicable to the case.

That portion of the second instruction referring to the appellee's purchase from Skinner, is evidently based upon the fact that the transfer was by parol, and not by deed as required by statute, and was therefore invalid, and no notice to defendant, or any one else, of the vendee's claim in any respect whatever. A title by occupation is, under our statute, an interest in real estate, and such an interest as is the subject of conveyance by deed: *Gillett et al.* v. *Gaffney et al.* 3 Colo. 351.

Appellant also assigns for error the refusal of the court to give certain instructions asked by the defendant below.

The second and third of said instructions refer to the derivation of appellee's title from Skinner, the first occupant of the ground in controversy; but, as the second of the instructions given by the court, and set forth above, denies to appellee any right by virtue of his purchase from Skinner, it was unnecessary to give the instructions asked upon that point; nor was the appellant prejudiced by such refusal.

The only other instruction, for the refusal of which error is assigned, that we need notice, is as follows:

4. "The plaintiff in this case claims the property in question, in the first count of the declaration, by virtue of the local laws and customs of Grass Valley and Ohio mining districts, and by occupation and purchase; and in order to recover on said count he must show what the laws and customs of said districts were, and that he complied with the same."

Section 8 of the chapter on Ejectment (R. S. 274), in force at the commencement of the suit, requires the plaintiff in this action to declare the nature of the estate claimed, whether in fee or otherwise. One of the objects of this is to give the defendant notice of the character of the title which he is called upon to defend against. Appellee, in his declaration, described the ground in controversy as a parcel of placer mining ground; and concluded by an averment in the first count, that he claimed the right to occupy and possess the same by virtue of and under the "local laws, rules and customs of Grass Valley and Ohio mining districts"; and that he claimed the said premises "for mining and building purposes by occupation and purchase." The general averment in the declaration that the plaintiff, on a day specified, was in possession

of the premises in question, and that afterward, on a day specified, the defendant entered thereon and unlawfully withholds possession from the plaintiff, sets out a sufficient cause of action. The appellee proved an unequivocal, exclusive and continued possession for three years previous to the alleged entry of appellant. The possession of the appellant was, at most, but constructive merely, the entry being made in order to survey the ground for the purpose of procuring a patent for it, together with other ground which he claimed, adjoining. The evidence even shows that the appellant, before his entry, so far admitted the right of appellee that he offered to pay the latter a certain price for the premises. No testimony whatever was offered by the appellant on the trial.

Ejectment is a possessory action; and to maintain it, the defendant must be in possession, actual or constructive, at the time of commencing the suit. This possession is presumptive of ownership, until the contrary is shown.

The plaintiff in such action avers prior possession and right of possession, by fee or otherwise. If he shows such prior possession upon trial, the title he has declared upon will be presumed without his being required to trace his title back to its origin, in the first instance. If, however, the defendant controverts such title, or *jus possessionis*, the plaintiff may then go back to establish such right; and so each party, seeking to establish paramount title, may alternate proof until the point is reached, where the title of one antedates that of the other, and the contest be determined.

In the case of *Smith* v. *Lorillard*, 10 Johns. 356, Chief Justice KENT, in delivering the opinion of the court, epitomizes the principles of this action, as applied to cases resting upon possessory rights, as follows: "That the first possession should in such cases be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right, every possessor of land has in the first instance, and after a continued possession for twenty years under pretense or claim of right, the actual possession ripens into a right of possession, which will toll an entry. But until the possession of

the tenant has become so matured, it would seem to follow, that if the plaintiff shows a prior possession, and upon which the defendant entered without it having been formally abandoned, as *derelict*, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession; and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which can not be over-reached, or puts an end to the doctrine of presumptions, founded on mere possession, by showing a regular, legal title or right of possession."

It is an elementary principle, having almost the force of a legal maxim, applicable to cases of this sort, that prior possession alone in the plaintiff, will entitle him to recovery against a mere intruder, whose entry, as in this case, is without right or title. And it matters not in such case, what is the character of the title declared on, whether in fee, or by virtue of local mining laws, or a right of possession generally.

The appellee having made out a *prima facie* case, was not required to go farther until his title, already shown, had been attacked. Had the appellant controverted the validity of the appellee's possessory right by setting up an adverse right of like nature, proof of compliance with the local laws on the part of the plaintiff below, as averred in his declaration, might then have become necessary.

The prior possession of the plaintiff being uncontroverted, a legal presumption arose that he had complied with all the requirements of the *lex loci*, peculiar to that mining district, necessary to the acquisition of the title upon which he had declared.

The Supreme Court of California, in an opinion delivered by Justice FIELD in the case of *Keane* v. *Cannovan*, 21 Cal. 305, held, that even where the plaintiff avers title in fee, proof of possession is evidence of seizin in fee in him, and no further or higher evidence of title is required to enable him to recover until the defendant has shown an anterior possession, or has traced title from a paramount source. And this is the settled ruling of the courts of that State: *Abbey H. Association* v. *Willard*, 48 Cal. 617; *Winans et al.* v. *Christy et al.*,

4 Cal. 70; *Bird* v. *Lisbros*, 9 Cal. 1. For the general rule on this point, see also Tyler on Ejectment, p. 70–74, and the numerous cases there cited.

Hence if any less estate than a fee is averred, proof of possession is presumptive evidence of seizin under such averred title.

This rule is consistent with the underlying doctrine, that the State or general government, in its corporate and sovereign capacity holds and always retains the absolute and ultimate right of property in and to all the land within its territorial limits; and that possession in an individual, is *prima facie* evidence of the grant of an estate from the sovereign authority: Bingham on Real Estate, 2–5.

Hence the plaintiff need not go back in his title further than to ante-date that of the defendant.

Under an averment of the plaintiff's ownership in fee and right to the possession of the land, at the date of the commencement of the suit, he may prove any facts which would entitle him to possession at that time: *Gillespie* v. *Jones*, 47 Cal. 263.

It was, therefore, unnecessary for the appellee to prove more than he did to establish *prima facie* his right of possession at the commencement of his suit.

There was no error in the admission of the testimony objected to by the defendant in the court below, that could, in view of the instructions given, prejudice the appellant.

The judgment will accordingly be affirmed.

THE UNION CONSOLIDATED SILVER MINING COMPANY v. TAYLOR.

(100 United States, 37. Supreme Court, 1879.)

Validity of location, when not to be questioned. The regularity and validity of the location of a mining claim can not be questioned in a suit in ejectment, where both parties claim title under the original locators.

[1] **Statute of limitations applied to tenants in common.** The possession of one tenant in common of a mining claim is the possession of his co-tenant, and if one of them be ousted the Statute of Limitations, (which in

[1] *Miller* v. *Myles*, 46 Cal. 536; *Phillips* v. *Gregg*, 10 Watts, 158.

Nevada is fixed at two years' adverse possession), would begin to run only from the date of such ouster.

Adverse possession as a bar to ejectment. Two years' adverse possession being a matter of defense under the Statute of Limitations in this case, should be made to appear affirmatively.

Defense of the statute by foreign corporations. Foreign corporations can not avail themselves of the protection of the Statute of Limitations in Nevada.

Special findings not to include evidence. The case was tried by the circuit court upon the written stipulation of the parties, and the court found that W., under whom plaintiff claimed title, was the owner of the premises in controversy at the date of his sale to plaintiff. Defendant objected that the findings did not sufficiently set forth the conveyances by which W. derived title: *Held*, that special findings should give only the ultimate facts and not the evidence, and that the ownership of W. was an ultimate fact, of which the conveyances would only be evidence.

Mining claims, how transferred. A written conveyance is not necessary to the transfer of a mining claim.

No reversal for error without prejudice. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent that it can not have affected the findings injuriously to the plaintiff in error.

Error to the Circuit Court of the United States for the District of Nevada.

This was an action of ejectment brought Dec. 23, 1874, by James D. Taylor, against the Union Consolidated Silver Mining Company, to recover the possession of an undivided interest, equal to five feet, of a mining claim and lode, part of the Comstock lode, situate in the Virginia Mining District, in Storey county, State of Nevada. Under an agreement of the parties the case was, without a jury, tried by the court, which found as facts, that the parties were tenants in common of the mining claim known as the Union claim, for an undivided interest in which the suit was brought; that they claimed and derived title from the same source, namely, Payne and Cook, the original locators of the claim; that one Solomon Wood, on the eleventh day of October, 1862, was the owner of at least an undivided fifty feet of the claim, having derived his title thereto regularly from the original locators, and that on that day he sold and conveyed by deed to the plaintiff, an undivided five feet of the claim, describing it as "five undivided feet interest in the claims of the Union Com-

pany, located upon the Comstock silver lode; said claims consist of three hundred feet, bounded north by the claims of the Sierra Nevada Silver Mining Company, and on the south by the claims of the Ophir Silver Mining Company"; that during the years 1860, 1861, 1862, 1863 and 1864, the original locators of the Union claim, and others deriving title from them, including Wood, the immediate grantor of the plaintiff, and the plaintiff himself, expended over $30,000 in prospecting and developing the claim, though the plaintiff personally had done no work upon it since 1863, nor had any been done for him, except so far as the work done by his co-tenants can be considered work done for him; that after the plaintiff's title had been acquired, namely, on the thirtieth day of September, 1863, C. H. Reynolds and others, all of whom had derived title from the original locators of the mining claim, sold and conveyed all their interests therein to a California corporation, styled the Union Gold and Silver Mining Company; and that, on the twenty-seventh day of May, 1874, that company sold and conveyed all its interest in the Union claim to the defendant, a California corporation, organized in and under the laws of that State.

The court further found that the defendant and its grantors had been in possession of the ground in controversy during more than two years before the commencement of this action, and were in possession when the suit was brought, and had been for more than five months before that time in possession of the Union claim, which extends on the Comstock lode a distance of three hundred feet, including the ground in dispute, and that the plaintiff had made no demand to be let into possession of the premises before commencing his action, but that the defendant was in the exclusive adverse possession before that time, and had, in fact, ousted the plaintiff from the possession.

In the course of the trial the company excepted to the admission of exhibits "A" and "C" and certain mining rules and regulations. Judgment was rendered for the plaintiff. The company thereupon sued out this writ, and assigns for error that the court below erred: 1st, In admitting as evidence said exhibits and said rules; 2d, In ruling that the plaintiff was entitled to recover; 3d, In giving judgment upon

the facts found for five instead of two and a half feet; 4th, In giving judgment for the plaintiff when the finding, which is special, and should therefore contain every fact essential to a recovery, does not show such facts of conveyance, possession, etc., as result necessarily in the legal conclusion that the plaintiff was entitled to the property sued for.

EXHIBIT A.

"COOK & PAYNE TO A. KENNEDY & Co.

"VIRGINIA CITY, Sept. 20, 1859.

"This is to certify that we, D. B. Cook, J. Cook and E. Payne, have this day sold, bargained and conveyed all our rights to and interest in a certain set of mining claims, to A. Kennedy & Co., said claims being situated as follows: Lying and being in the Virginia district, north of the Comstock claims and situated on the Comstock and Penrod vein, for and in consideration of which A. Kennedy & Co. agree to prospect the same thoroughly, and when pay dirt is struck, then Cook, Payne & Co. agree to pay one half of the expense and come in equal partners to the same, Kennedy & Co. receiving one undivided half of six hundred feet.

"D. B. COOK,
"JAMES COOK,
"E. PAYNE.

"Witness: S. McFadden.

"Filed Sept. 7, 1860, at 2½ P. M.

"Rec. Sept. 8, 1860, at 3 P. M., p. 548, Vol. B, Kinsey's Records."

EXHIBIT C.

"GOLD HILL, UTAH TERRITORY, July 20, 1859.

'This is — show that I, Edward Payne, have this day admitted David B. Cook into the claim north of the Comstock and Co.'s stakes, as an equal partner in the six hundred feet of the quartz lead and known as the Comstock lead, and running north of the Comstock stakes. And als– give the power to manage that claim to work or let as he, D. B. Cook, sees fit.

"EDWARD PAYNE,
"JAMES COOK."

HARRY I. THORNTON and H. L. SMOOT, for the plaintiff in error.

W. E. F. DEAL, *contra.*

Justice STRONG, after stating the case, delivered the opinion of the court.

Upon the facts found by the circuit court it is evident that Taylor, the plaintiff below, was entitled to recover, unless he was barred by the Statute of Limitations. Claiming as both parties did, under Payne and Cook, the regularity and validity of the location of the mining claim are not in question.

And when, in 1862, the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantor and with others deriving title from the original locators, expending large sums in prospecting and developing it (acts which the State statute declares shall constitute adverse possession), he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase that company succeeded to a tenancy in common with him, and so did the defendant when it became the purchaser. Although after 1863 the plaintiff did no work personally upon the property, he did not thereby lose the possession he had after his purchase from Wood. The possession of his co-tenants was his possession. They held it for him until he was ousted; that this is a settled rule of law, is not denied. And we find nothing in the statutes of Nevada to which we have been referred that is at variance with the rule, even when applicable to mining claims. That it does apply is expressly held in *Van Valkenburg* v. *Huff*, 1 Nev. 142. It follows that neither the defendant nor its grantor had any possession adverse to the plaintiff, prior to the time when the ouster was made, and no ouster is found to have been made two years before the suit was brought. The finding that the defendant was in possession more than two years before suit was brought, is not a finding of an adverse possession during all that period, such as to constitute a bar under the Statute of Limitations. Such a bar, therefore, does not exist, unless

the ouster took place anterior to the commencement of those two years; and as that is a matter of defense, it should appear affirmatively, to be of any avail.

It is, however, useless to enlarge upon this, for the findings show clearly that the defendant has no protection under the Statutes of Limitations. The plaintiff was in possession with others who derived their title from the original locators until the Union Gold and Silver Mining Company, a California corporation, acquired their title in September, 1863. After that time the statute could not run against him in favor of that corporation or its grantee, the defendant, also a foreign corporation. The Statutes of Limitations of Nevada are held by the Supreme Court of that State to except foreign corporations from their protection: *Robinson* v. *Imperial Silver Mining Co.*, 5 Nev. 44; *Barstow* v. *Union Consolidated Silver Mining Co.*, 10 Id. 386. Hence those statutes can not be set up by the defendant as a defense in this case; and as the circuit court found as a fact that the plaintiff had been ousted by the defendant from his property, no reason appears why he was not entitled to recover according to the interest which he held prior to the ouster.

It is insisted, however, that if entitled to recover at all, judgment should have been given for no more than two and a half undivided feet of the mining claim. This position can not be maintained. It is true the original locators claimed six hundred feet extending along the Comstock vein, but of more than three hundred feet they never had an undisputed title, and that three hundred feet lies next to the claim of the Ophir company on the south. Indeed, the finding is express that the Union claim begins at a point fifteen hundred feet north of the claim of the Ophir company, and extends northward on the Comstock lode three hundred feet, including the ground in dispute. Of that claim Solomon Wood, the plaintiff's grantor, was the owner of at least fifty feet undivided; and he sold and conveyed to the plaintiff five undivided feet interest therein, describing the claim as consisting of three hundred feet, bounded on the south by the claim of the Ophir company. There can be no doubt, therefore, what was intended to be conveyed. Plainly, it was five undivided feet of that three hundred, and therefore, whether the whole

claim in fact consisted of three hundred or six hundred feet can make no difference. Owning, as Wood did, fifty feet undivided, it was in his power to convey, as he did, an undivided interest of five feet in the southern three hundred.

It is objected by the plaintiff in error that the special finding of the court was not sufficiently full and formal to justify any judgment; that it did not find the essential facts, but left presumptions of fact to be drawn; that it did not find how Solomon Wood became the owner, or set out in words, the conveyances under which the parties claimed. Whether a special finding of facts by the court must have all the requisites of a special verdict, it is not necessary now to assert or deny, for all that is essential to such a verdict is an ascertainment of the ultimate facts. A jury is not to find evidence. We think the ultimate facts were sufficiently found in this case. The ownership of Wood in 1862 was an ultimate fact, and even if Taylor had no other right to the possession than that which he derived from Wood by conveyance, it was not necessary to set forth the chain of conveyances by which Wood became the owner. A transfer of possession is sufficient. They would have been but evidence of Wood's ownership. Besides, a written conveyance is not necessary to the transfer of a mining claim: *Table Mountain Tunnel Co.* v. *Stranahan*, 20 Cal. 198. But Wood was in possession when he sold to Taylor, and Taylor then went into joint possession with him. That possession is enough to justify a recovery by him against a disseizor.

The only other assignment of error is the first, and it needs no consideration. Apart from the fact that the defendant claims under Payne and Cook, and is therefore not at liberty to dispute their title, it is impossible to discover how it could have been injured by the reception of Exhibits A and C. The instrument C was certainly sufficient to transfer an interest in the mining claim and the mining rules, at worst, were only immaterial. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment when it is apparent, as in this case, that it can not have affected the verdict or the finding injuriously to the plaintiff in error.

Judgment affirmed.

Justice FIELD did not sit in this case.

MURPHY v. COBB ET AL.

(5 Colorado, 281. Supreme Court, 1880.)

[1] **Void deeds based on title obtained by trespass.** From the plaintiff's testimony it appeared that he and two others had taken possession of his employers' mining claim during their temporary absence—a clear attempt to "jump" the ground—and after locating the same the two others had conveyed to plaintiff. In ejectment for the claim. *held*, that the court properly refused to admit these conveyances as evidence of plaintiff's title.

Duty of court to direct verdict for defendant. Where the plaintiff shows upon the trial no cause of action, or makes out no case whatever, and no motion for nonsuit is interposed, it is not only the right, but may be the duty of the court to direct a verdict for the defendant. This practice is common to both the code and the common law.

Appeal from the District Court of Summit County.

WHITE & MULLAHEY and W. R. BARTLETT, for appellant.

J. F. WELBORN and R. S. MORRISON, for appellees.

By the Court: STONE, J.

The appellant, who was plaintiff in the court below, brought suit for the possession of certain parcels of placer mining ground alleged to be in the possession of defendants, and from which plaintiff had been wrongfully ousted, that he claimed by right of pre-emption under the mining laws, and also by deed from other like pre-emptors. The defendants denied plaintiff's right of possession, and claimed prior occupation by themselves as owners of the ground, with present possession by right of such ownership. From the plaintiff's own testimony it appeared that he with two others had taken possession of a portion of ground belonging to defendants, during the temporary absence of the latter, had surveyed and filed locations of the same, and that the two other persons had then deeded their interest in the same to the plaintiff. At the conclusion of the plaintiff's testimony he offered in evidence these deeds and location certificates.

The court refused to admit these papers as evidence in the

[1] *Miller* v. *Taylor*, 6 Colo. 41.

case, and directed the jury (plaintiff having no further testimony to offer) to return a verdict for the defendants, which was done, and judgment entered accordingly. From this judgment plaintiff appealed, and assigns for error the refusal of the court to admit in evidence the papers referred to, and in directing the jury to return a verdict for defendants.

There is no error disclosed in the record. Plaintiff's own testimony—and there is no other in the case—shows clearly that it was a bold attempt on his part, aided by his two confederates, to "jump" a portion of the ground of his employers. The ground was not subject to relocation; in mining parlance, it was not "jumpable," and no rights whatever were or could be acquired by plaintiff, or those acting with him by virtue of their survey and record of location. The certificates of such location and the deeds from his co-trespassers were evidence only of a possession which plaintiff's testimony had established as a mere trespass. In every case where the trial is to a jury, there is or may be a preliminary question for the court to determine—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is cast: *Commonwealth* v. *Clark*, 4 Otto, 278.

And where the plaintiff shows upon trial no cause of action, or makes out no case whatever, and no motion for nonsuit is interposed, it is not only the right, but may be the duty of the court to direct a verdict for the defendant: *Teft* v. *Ashbaugh*, 13 Ill. 602. This practice is common to both the code and the common law: Proffatt on Jury Trials, Secs. 351–4, and cases cited.

The judgment of the court below is affirmed.

Affirmed.

1. Ejectment lies for a coal pit: *Harebottle* v. *Placock*, Cro. Jac. 21.

2. The legal title is not necessarily involved in ejectment; prior possession may be relied on to defeat or recover: *Grady* v. *Early*, 18 Cal. 108; *Post* PRACTICE; *Hawkshurst* v. *Lander*, 23 Cal. 331; *Post* POSSESSION.

3. Plaintiff may recover in ejectment upon title acquired by possession and held during the period of the Statute of Limitations: *Harris* v. *Equator Co.*, 8 Fed. 863; 2 Col. L. R. 63; *Post* POSSESSION.

4. Defendant in possession need not prove location till a better title has been shown by plaintiff: *Penn. Co.* v. *Owens*, 15 Cal. 135; *Post* POSSESSION.

5. Ejectment does not lie for the interruption of an easement: *Carnahan* v. *Brown*, 5 M. R. 193; *Dark* v. *Johnson*, 55 Pa. St. 164; *Post* LICENSE; *Union Co.* v. *Bliven Co.*, 3 M. R. 107.

6. *Contra:* Parol licensee may assert right to possession by ejectment: *Beatty* v. *Gregory*, 17 Iowa, 109; *Post* LICENSE.

7. Grantee of the legal title can not recover possession against party holding the equitable title: *Stith* v. *Lookabill*, 76 N. C. 465; *Post* TRUSTS.

8. Plaintiff can not recover lode after it leaves its side lines: *Johnson* v. *Buell*, 4 Colo. 557; *Post* LOCATION.

9. Plaintiff may recover less interest than that sued for: *Halsey* v. *Martin*, 22 Cal. 645; *Post* MORTGAGE.

10. Pleading and evidence required in ejectment, under anomalous Statute of Montana; *Davis* v. *Clark*, 2 Mont. 310, 394.

11. Title under foreclosure proceedings can not be collaterally impeached in ejectment: *Gartside* v. *Outley*, 58 Ill. 210; *Post* MORTGAGE.

12. Failure to pay foreign miners' tax is no bar to recovery in ejectment: *Mitchell* v. *Hagood*, 1 M. R. 506.

13. Incidental evidence (stock certificate in incorporated association) allowed to prove possession, in ejectment: *Penn. Co.* v. *Owens*, 15 Cal. 135; *Post* POSSESSION.

14. Where defendant sets up affirmative title, plaintiff must reply: *Newman* v. *Newton*, 14 Fed. 634; 4 McCr. 293.

15. No collateral attack can be made on patent, in ejectment: *St. Louis Co.* v. *Green*, 13 Fed. 208; *St. Louis Co.* v. *Kemp*, 104 U. S. 636; *Post* PATENT; *Poire* v. *Wells*, 6 Colo. 406.

16. Effect of outstanding title in third party: *Bradley* v. *Lee*, 4 M. R. 171.

17. Conveyance of title, out of plaintiff, before suit brought: *Mallett* v. *Uncle Sam Co.*, 1 M. R. 17.

18. Defendant allowed to prove affirmative title without pleading it: *Stone* v. *Bumpus*, 4 M. R. 272.

THE CLEVELAND AND PITTSBURG RAILROAD COMPANY v. BALL.

(5 Ohio State, 568. Supreme Court, 1856.)

[1] **Opinion of witness as to value of land.** The opinion of a witness as to the amount of damages which a land owner will sustain by the appropriation of a portion of his land for the purpose of constructing a railroad over it is not admissible as evidence, but a witness may be allowed to give his opinion as to the value of the land affected.

Cross-examination as to interruption of transit. Where, in a proceeding by a railroad company to appropriate land for its use, an inquiry of damages is made, and it appears from the direct examination of a witness that on the tract of land over which the railroad is to be constructed there are coal mines, and that the building of the road between them and a navigable river would tend to prevent the coal from being taken from the mines to the river, the witness, on cross-examination, may be asked whether the facilities for transportation of coal to market would be diminished by reason of the construction of the road.

[2] **Damages reduced because of improved facilities for transit.** Where compensation is claimed for the location and construction of a railroad between coal mines and a navigable river on the land owner's premises, whereby the conveniences of the river transportation for the coal to market were injured, or cut off, it is competent for the railroad company to show that the river transportation, in connection with the coal banks, had ceased to be valuable, or become of less value by means of the facilities for coal transportation afforded by the railroad, for the purpose of reducing the damages.

Measure of damages—Absolute and relative value. Where a piece or strip of land is, by appropriation made by a railroad company, severed from its connection with the other land of the owner, in estimating the compensation to be made to the owner, not only is the abstract value of the strip or piece taken to be considered, but also its relative value and the effect arising from its severance from the residue of the owner's land, as well as the uses to which it is to be appropriated.

Damage to residue—Betterments. In case of a railroad appropriation of the right of way through a tract of land causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue can not be taken into account in estimating the amount of compensation to be paid to the owner, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land.

[1] *Brown* v. *Corey*, 5 M. R. 368.

[2] *Dudley Co.* v. *Grazebrook*, 1 B. & Ad. 59.

Petition in error to reverse the judgment of the court of common pleas in affirmance of the judgment of the Probate Court of Jefferson county.

The original proceeding was instituted by the plaintiff in the Probate Court of Jefferson county, under the statute of April 30, 1852, relating thereto, for the appropriation of certain land belonging to the defendant, situate in said county, for the purpose of constructing thereon its railroad.

On the 20th of June, 1853, a jury was impaneled to assess the damages, and sent out to view the premises sought to be appropriated, and on their return into court, the parties called witnesses and examined them before the jury. On this examination exceptions were taken to the ruling of the probate judge as to the admissibility of evidence; also to his charge to the jury, and to his refusal to charge as requested by the plaintiff in error.

A writ of certiorari was afterward prosecuted in the court of common pleas by the railroad company, to reverse the confirmation of the verdict of the jury by the probate court; the order of the probate court was affirmed by the common pleas, and thereupon the company filed a petition in error in the district court, and the cause was reserved for decision in this court.

During the trial of the cause in the probate court the land owner asked a witness this question:

"What, in your opinion, is the damage which Joseph L. Ball will sustain by reason of this appropriation?"

The question was objected to, the objection overruled, and the witness answered "that in his opinion the said Joseph L. Ball sustained damages by reason of the appropriation to the amount of $5,000 or $6,000." The answer was objected to, and a motion made that it be withdrawn from the jury, which motion was also overruled.

Similar questions calling for the opinion of witnesses as to the gross amount of damage, were put to several other witnesses and were answered; all objections to the questions and answers being overruled.

The land owner next offered the following testimony, which was objected to by the railroad company, the objection over-

ruled, and the testimony permitted to be considered by the jury:

"That in an adjoining field of the said Ball, and outside of the limits of the act of appropriation, there was a spring of water; that, in his opinion, the most convenient mode of raising said water would be to bring the same from the spring to the house of Ball in pipes, and that a pipe from the spring to the house of the said Ball would cross the strip of land appropriated at a point where the cut was eleven feet deep; that, in his opinion, the use of the spring would be lost to the said Ball, and that in witness' opinion, he was damaged $1,000 by the loss of the spring; that he was damaged $1,000 by the cutting of the farm; that he was damaged $500 by the cutting off of a road which he had to the hill; that he was damaged $500 by the annoyance of the railroad; that there was a site for a barn over the limits of the appropriation, but without them, upon which no barn was now situated, and that he was damaged $300 by the loss of that site, and that the land taken was worth $310."

The railroad company moved the court to take from the jury each one of those estimates, except that of the value of the land; this motion was overruled, and the whole testimony permitted to go to the jury as it had been testified to by the witness.

Evidence was further offered by the land owner that there were valuable coal mines on the tract through which the railroad passes; that the road was located between the mines and the river, and that, in the opinion of the witnesses, the railroad would prevent the coal from being transported across it to the river.

The counsel of the railroad company, in the cross-examination of these witnesses, inquired: "Will the facilities of transportation of coal to a market be diminished by reason of the construction of this road?" This question was objected to by the land owner, and the witnesses were not permitted to answer it.

After the testimony was closed, the court was requested by the counsel for the plaintiff in error to charge the jury, among other things, as follows:

1. That in estimating damages to property *outside of the*

limits of the land appropriated, the damages only are to be considered which *necessarily* result from the appropriation of the land; and that in estimating such damage they are not to take into account any supposed future damages from the working or construction of said road.

2. That in estimating damages they are not to take into account any supposed future annoyance, or damage to persons or cattle, which may be caused by the working of the railroad.

3. That it is proper for the jury to consider the benefits, by reason of the appropriation, to the residue of the tract through which the appropriation is made, *for the purpose of determining whether such residue is injured by the appropriation.*

4. That if the jury are of opinion that the whole of the residue of the tract through which the appropriation is made, *is not diminished in value* by the appropriation, that no damages are to be assessed for any injury which it may be claimed is done by the appropriation of such residue.

These instructions the court refused to give to the jury, but did charge them as follows:

As to the first and second of the propositions asked to be charged:

"That in estimating the defendant's damages, they were to take into consideration such injuries or damages to his property as might reasonably be looked for and expected as the necessary or natural consequence of the appropriation made by the railroad company, and the construction and use of the work proposed by it, or such as are reasonably to be expected as proximate consequences from the same, that is, *near and immediate*, and not such as may be *merely imaginary*, or may by *possibility* result therefrom."

As to the third point requested, the court charged the jury:

"That by the constitution of the State and their oaths, they were required to assess the defendant's damages, or the amount of his compensation, irrespective of any benefit proposed by the plaintiff as a railroad company, and that they were to exclude all real or imaginary benefits from their consideration."

As to the fourth point requested, the court charged the jury:

"That the constitution of the State provided that the compensation shall be assessed by the jury without deduction of benefits to any property of the owner. That to charge the jury as requested would be asking them to disregard this provision of the constitution, as well as article 13, section 5, which provides that the compensation made to the owner of the property shall be irrespective of any benefits from any improvement proposed by said corporation."

Errors are assigned upon the several rulings of the court excepted to, and upon the refusal of the court to charge the jury as requested, and also upon the charge as given.

R. S. MOODY and ELI T. TAPPAN, for plaintiff in error.

STANTON & MCCOOK, for defendant in error.

BARTLEY, C. J.

The first inquiry presented in this case is, whether the court below erred in admitting the opinions of witnesses as evidence, to show the *damages* which the appropriation would occasion to the defendant. This is fully answered by the determination of this court at the last term, in the case of *The Atlantic and Great Western Railroad Co.* v. *Campbell*, 4 Ohio St. 583. The general rule that the testimony of witnesses is confined to a statement of facts coming from observation, knowledge and recollection, as distinguished from *the mere opinion or inference* of a witness, is a safe rule, although subject to numerous exceptions. Opinions are often formed upon slight or inaccurate information, and sometimes the mere dictate of feeling, rather than the exercise of judgment, and therefore to be received with great caution even when competent as evidence.

There are some facts of such a nature as to be incapable of the ordinary means of proof by direct evidence, and consequently resort is had to the best means of proof which the nature of the subject affords. On questions of science, skill, trade and others of a like nature, experts are allowed to give their opinions as evidence. On questions of pedigree or relationship, character, boundary and the like, also on inquiries touching the extent of a man's property, his solvency, health, sanity,

affection antipathy, and others of a similar nature, the knowledge of witnesses is chiefly a matter of opinion, and it is often impossible to enumerate each particular fact from which the knowledge of a witness is derived; and of this nature are inquiries touching the value and quality of property. And in the case of *The Atlantic and Great Western Railroad Co.* v. *Campbell*, above cited, while the opinions of witnesses as to the amount of damages sustained are excluded as incompetent evidence, the court did not exclude the opinions of witnesses as to the value of the land before and after the location of the railroad. It is proper for a witness to describe the particulars of the injury, the manner in which the property is affected, and give his opinion as to the value of the land. And it is for the jury to find from all the facts—from the value of the land, and the extent and manner in which injured, and other circumstances, what amount of damages has been sustained by the land owner. And to allow witnesses to give their opinions as to the amount of the damages suffered, would permit witnesses to swear to the conclusion which it is the peculiar province of the jury to deduce from the evidence. Upon this ground, therefore, there was error in the proceedings of the court below.

2. It appears that in the further progress of the case before the probate court, evidence was given by the land owner that there were valuable coal mines on his land through which the railroad passes; that the road was located between the coal banks and the river, and that in the opinion of the witnesses the railroad would prevent the coal from being carried across the road to the river. On cross-examination, the counsel for the company inquired of the witnesses: "Will the facilities for transportation of coal to a market be diminished by reason of the construction of this railroad?" This inquiry was objected to by the land owner, and the objection sustained, to which ruling an exception was taken.

In this, the probate court manifestly erred; the inquiry was legitimate and proper as coming within the scope of cross-examination; and it was especially important to show the value, if there would be any value, in the river transportation in connection with the coal banks. This would not be deducting benefits, but simply showing what value there would be

in the river transportation to the owner of the coal banks, after the construction of the road; for that value, so far as affected, would be one of the direct incidental consequences occasioned by the appropriation. If, by means of the railroad facilities, the river transportation would be superseded by a cheaper and better mode of transportation, and thus be rendered of but little or no value to the owner, he ought not to be paid a compensation on account of an incidental disadvantage or loss of value which he did not suffer.

3. The questions arising on the charge of the court to the jury, and the refusal of the court to charge as requested, are comprehended in the following inquiries:

1. In estimating the damages to property outside of the limits of the land appropriated, what compensation for the incidental injury to the value of the residue of the land, is to be taken into the account?

2. Can the damages to the residue of the land through which the appropriation is made, be reduced by deducting therefrom, or setting off against them, the resulting benefits of the railroad to such residue of land?

The provisions of the constitution of this State on this subject, are somewhat different from the provisions in the constitutions of some of the other States. "*Full compensation*" is required to be made to the owner *in money* for the appropriation of his property, as a condition precedent. To be a full compensation it must be a remuneration or recompense for that detriment or loss to the owner in the value of his property, arising from *the taking of his property in connection with the use for which it is taken.* Where a piece or strip of land is taken and severed by the appropriation from its connection with other land of the owner, some elements of compensation necessarily enter into the computation besides the abstract value of the number of feet or acres of ground actually taken. These elements of compensation may be comprehended in the following: 1. The abstract value of the quantity of ground taken. 2. The value arising from the relative situation of the land, taken in its connection with the residue of the owner's land from which it is severed; and 3. The effect upon the value of the residue of the owner's land arising from the uses for which the appropriation is made.

These grounds of compensation will give the land owner a recompense for the loss in the value of his property caused by *the appropriation for the special purposes or use* for which it is authorized. Thus far, and thus far only, is the loss in the value of the residue of the land of the owner to be taken into account in making up the amount of the compensation to be paid.

It is said in the work of Redfield on Railways, 152: "It is requisite that the tribunal appraising land damages for lands condemned for railways, should take into consideration all such incidental loss, inconvenience, and damage, as may reasonably be expected to result from the construction and use of the road *in a legal and proper manner.* And as all tribunals, having jurisdiction of any particular subject-matter, are presumed to take into consideration all the elements legally constituting their judgments, such incidental loss and damage will be barred by the appraisal, whether in fact included in the estimate or not."

It is true that speculative prospective detriment, or injury to the value of the residue of the land, either by means of the severance therefrom of the land taken, or by the use and workings of the railroad, is not to be taken in the estimate; but the compensation is to be confined to such loss and injuries in the value of the owner's property as are appreciable at the time, as the necessary or natural consequences, fairly and reasonably expected to follow, from the appropriation made to the uses of the railroad, including in the incidental injury to the value of the residue of the land, the deterioration in value from the necessary inconvenience and annoyance in the enjoyment of the same arising from the operation of the railroad. This is in accordance with the rule estimating the compensation in England, which requires that "regard shall be had not only to the land taken, but also to damage by reason of severance from other lands, or otherwise injuriously affecting such lands."

The second inquiry arising on the instructions of the court to the jury, involves the inquiry whether, in estimating the compensation for the incidental loss or injury to the residue of the owner's land, the incidental prospective benefits to such residue of the land from the railroad are to be taken into the account, in reduction of the amount of the loss or injury.

Mr. Redfield, in his work on Railways, 135, says: "In consequence of numerous ingenious speculations in regard to possible advantages arising from the public works for which lands are taken, the whole subject has become, in this country especially, involved in more or less uncertainty. All the cases seem to concur in excluding *mere general and public benefit* in which the owner of land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation.

It must be conceded, that the rule on the subject, recognized formerly in some adjudications in this State, has been materially changed by the provisions of the present State constitution. By the 19th section of the bill of rights, it is declared, among other things: "Where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, *without deduction for benefits to any property* of the owner."

And, by the 5th section of the 13th article of the constitution, it is further provided, on this subject: "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money to the owner, *irrespective of any benefit from any improvement proposed* by such corporation."

Touching the subject of the construction of these provisions of the constitution, this court, in the case of *Giesy* v. *C. W. & Z. Railroad Company*, 4 Ohio St. 332, used the following language: "The jury are not required to consider how much, nor permitted to make any use of the fact that it may have been increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect the partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. It would be unjust, because it establishes for a corporation what is done for no one else, a sort of right in the property of others, to the reflected benefits of its improvement; itself submitting to no reciprocity by affording others a compensation for the effect of their improvements, upon the property of the corporation. And it is doubly unjust, where, as must very often happen, the in-

crease in value accrued to the benefit of a former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price."

It is insisted in the case before us, that in estimating the compensation for the incidental injury to, or loss of value in, the residue of the tract belonging to the land owner, the incidental local benefits arising from the structure of the railroad, to any part of such residue of the land, must be taken into the account in reduction of the amount of the compensation.

The constitution requires full compensation in money, and prohibits *deductions* for benefits *to any property* of the owner, from *any improvement proposed* by the corporation. It would scarcely be claimed by any one that the compensation required by the constitution was limited to the abstract value of the number of feet or acres of ground taken in the appropriation. The compensation must be broad enough to cover the full loss in value which the owner suffers in his property by means of the appropriation for the uses for which it is made. But although it is not claimed that any deduction is to be made in view of the general prospective or resulting benefits in which the owner shares in common with others in the vicinity of the improvement, and which constituted a leading object in the grant of the important privileges by the State to the company, yet it is insisted that incidental or local benefits may be conferred on the residue of the owner's land by the construction of the railroad, and that in estimating the compensation to be allowed for the incidental injury or loss of value in the residue of the owner's land the local benefits to such residue of the land are to be taken into the account and deducted; and that therefore the rule of compensation for the loss in the value of the residue of the land is the loss in value to the whole residue of the tract after deductions or allowances for the local incidental advantages, where a local benefit or advantage is blended with, or has a direct or immediate connection with, or bearing upon, the local incidental injury, such as appears in this case in the instance of the obstruction of the free and convenient communication between the coal bank and river, which loss may be either totally or partially removed by the facilities for the transportation of coal to market afforded by the railroad, then, the local advan-

tage or benefit may have to be taken into consideration, in order to estimate the extent of the loss, if any, in the value of the property, caused by the injury or disadvantage. For if the river transportation for getting the coal to market had ceased to be of any great value, by means of the facilities supplied by the railroad for the transportation of the coal, the owner ought not to be compensated for the disadvantage beyond its actual value to him in the enjoyment of his property. Where, in the construction of a railroad, a ditch or excavation is made, which drains a swamp and renders a part of the owner's land valuable, which had been previously of little or no value, but the same ditch, in draining the swamp, destroys a valuable spring of water, the injury and benefit may be so blended that they must necessarily be taken into consideration in estimating the compensation to be made. But where, in constructing a railroad, two ditches are made, one at one side of the owner's tract, which benefits the land by draining a swamp, and the other at the other side of the tract, which destroys a valuable spring, or where the locality and subject-matter of the local benefit and injury are otherwise separate and wholly unconnected, although on the same tract of land, the question may be quite different. And in such case, whether, under the peculiar provisions of the constitution of this State, in estimating the compensation to be made to the owner for the local incidental injury to the residue of his land, any deduction or allowance can be made for such separate local benefit, is a question not necessarily presented in this case, and as to which we express no opinion at this time. The views already expressed in this connection have gone far enough to show that there was no error in the instructions of the probate court to the jury.

On the other grounds, however, the judgment and proceedings of the court below are reversed.

Judgment reversed, and cause remanded for further proceedings.

EVANS v. HAEFNER.

(29 Missouri, 141. Supreme Court, 1859.)

Collateral attack. Judgment of condemnation can not be questioned in a collateral proceeding.

Tender of condemnation money. After money has been paid into court, by order of court, and tendered to the attorney of the party whose land has been condemned, who refuses to take it, the railroad company may lawfully enter upon such land protected by the order of court.

Property in the minerals. Minerals found below the bed of the road and whose excavation is not necessary for the construction of it, remain with the owner of the soil; but as to the portion removed in order to build the road, the owner of the soil (the party whose lands have been condemned) can not claim them.

Appeal from Washington Circuit Court.

This was an action to recover possession of certain lands, and damages for entering the same and cutting down and destroying timber, and for digging up and carrying away rock, stone, mineral and gravel, etc. The defendants based their defense upon a condemnation of the land in controversy in certain proceedings instituted in the Washington Circuit Court, in the name and in behalf of the St. Louis and Iron Mountain Railroad Company against the plaintiff and his wife. In these proceedings the land sued for was condemned, and the court, in its order confirming the report of the commissioners, made the following order: "It is further ordered that the plaintiff deposit in the hands of the clerk of this court, William A. Matthews, forthwith, to the credit and on the account of the defendants, the said sum of nine hundred and twenty-five dollars, to be paid over to the defendants as their compensation; and upon the plaintiff depositing said sum as aforesaid, it shall be entitled to enter upon, take possession of and use the said land for the purposes aforesaid, during the continuance of its corporate existence." These proceedings were instituted in April, 1858.

The defendants also adduced in evidence the following instrument: "January 15, 1858. Whereas George B. Cole,

Israel McCready, John Deane, J. H. McIlvaine, Andrew Carey, Samuel Singer, J. H. Morse and Thomas C. Johnson, a committee appointed by the citizens of Potosi, in the county of Washington, acting for themselves and such others as shall co-operate with them, parties of the first part, have proposed to the St. Louis and Iron Mountain Railroad Company, party of the second part, to establish a branch road from the main line of the St. Louis and Iron Mountain Railroad to Potosi, by the nearest and most practicable route; and whereas the said railroad company is willing to establish and locate said branch upon the considerations hereinafter named; now therefore, these presents witness: 1. That the said parties of the first part, for themselves, said citizens, hereby agree to and with the said railroad company to do the graduation, masonry, bridging, ballasting, clearing and grubbing, and all other work necessary to prepare said branch road for the laying of the track thereon. 2. The said parties of the first part further agree at their own expense to procure the right of way and the necessary depot grounds, and to cause the same to be conveyed to said company. 3. The said branch road shall be located upon the shortest, most practicable and cheapest route to be designated by the engineer of the St. Louis and Iron Mountain Railroad Company, acting in concert with an engineer appointed by the said parties of the first part. 4. The cost of making the preliminary surveys on said route shall be paid by said railroad company except the wages of the engineer appointed by the parties of the first part. 5. When the graduation, masonry, etc., and all other work necessary to prepare said road-track for the laying of the rails shall be completed, delivered and accepted by said company, then the said party of the second part binds itself to furnish the iron rails, ties, spikes, etc., and to proceed without delay to lay down and complete said track, to erect the necessary buildings, provide rolling stock and proceed to operate said road. 6. It is further agreed that said railroad company shall have the entire control and management of said road, and the regulation of the rates for passengers and freight thereon. 7. The said branch when completed shall, together with the appurtenances thereto, become the absolute property of the St. Louis and Iron Mountain Railroad Company. 8. The grade of such

branch shall not exceed seventy feet per mile. 9. When said road-bed, masonry, etc., are completed, delivered and accepted by said railroad company, the cost thereof shall be estimated by the engineers of both parties, not to exceed the cost of similar work on the main line; and, in case they can not agree, a third engineer shall be selected by them as umpire, and the decision of the majority shall be final. For the amount so fixed the said railroad company shall issue its stock to such persons and in such amounts as shall be directed by a committee of the citizens of Potosi. 10. The graduation, masonry, etc., on said branch road shall be commenced by the citizens of Potosi within three months and completed within twelve months from the date hereof. 11. If at any time within which the work is to be commenced as above, it shall be found impossible to raise the necessary subscription among said citizens to complete said work, then the parties of the first part shall have the right to terminate this contract by notice in writing to said railroad company within said period. In testimony whereof," etc.

The St Louis and Iron Mountain Railroad Company gave to Mr. Carter the following authority to procure the condemnation of the right of way for the Potosi branch railroad:

"The undersigned, president of the St Louis and Iron Mountain Railroad Company, hereby authorize William Carter, Esq., the attorney at law employed by divers citizens of the town of Potosi, to use the name of said company in all necessary legal proceedings to procure condemnation of the right of way for the Potosi branch of the S. L. & I. M. R. R. It is expressly understood, however, that the said company shall in no event be held responsible for the professional fees of the said attorney, nor for any costs or expenses attending the procurement of said right of way, but the same are to be wholly borne by the said citizens of Potosi. [Signed] Madison Miller, president. St Louis, March 29, 1858."

The trespasses complained of were committed by the defendants in entering upon the land of plaintiff, under the authority of the above contract for the purpose of constructing said branch railroad track. It appeared that some gravel was dug up for embankment purposes outside the line of the road as condemned.

The court, at its own instance, gave the following instructions to the jury: "The judgment of the court rendered at the May term, 1858, in the proceedings of the St Louis and Iron Mountain Railroad Company to condemn the roadway of the branch road through the land and town lots of the plaintiff, and the deposit of the amount of money required by said judgment, with the clerk, was a complete investiture of the company of the title to the land condemned from the date of said deposit, and is a full justification to the company, her agents and contractors, to enter on the land then condemned, and construct their road, doing no damage to the adjoining land of the plaintiff; and such judgment precludes all inquiry by the jury into the value of the land taken or the damages done to the adjoining land in consequence of the location of said road, the same having been adjudicated and settled by the judgment aforesaid. The damages sustained by the plaintiff for taking and using the gravel on adjoining land, and any injury done to the adjoining lands by throwing down and keeping open the fences, if proven to have been done by the contractors or their hands, the defendants are liable therefor; and the jury will find for the plaintiff such amount therefor as, under all the circumstances, they may think right. The contract of the defendants with the St Louis and Iron Mountain Railroad Company, read in evidence, is a full authority from the company to them to enter upon the said roadway and construct their said branch road. Although the defendants were entitled to pull down the fences along the line of said road for the purpose of constructing their road, yet they could not by law do so in such manner as to expose his inclosed lands adjoining, but must keep up the fences so as to prevent such exposure, or they will be liable for any damages resulting from such exposure. The title vested in the company by the judgment aforesaid conferred on the company the right to all mineral, etc., found within the line of said roadway."

The plaintiff asked the court to instruct the jury as follows: "1. The St. Louis and Iron Mountain Railroad Company has no legal right to transfer their privilege of condemning private property to their use; and the contract of the 15th of January, 1858, read by defendants, and the written authority

to Wm. Carter, dated March 29, 1858, confer no privilege on defendants to use the name of the company to condemn the plaintiff's land for the use of the Potosi branch road; and the proceedings had under said contract and authority, as read by defendants, constituted no defense to the action. 2. As to the trespass that may have been committed by defendants, or their agents, or under their direction, outside of the eighty feet constituting the road-bed, the jury will find such damages as they believe the material taken was reasonably worth and the injury sustained will justify. 3. If the jury find from the evidence that the defendants or their agents or employes entered upon plaintiff's land as alleged in the petition and withheld the same from plaintiff, then they will find the defendants guilty, and assess such damages as from the evidence it appears plaintiff has sustained. 4. There is no evidence before the jury that the St. Louis and Iron Mountain Railroad Company had any authority to construct the Potosi branch road mentioned in the defendants' answer. 5. The defendants, having failed to prove any tender of the damages assessed to plaintiff by the commissioners, are not justified in their entry upon plaintiff's lands. 6. Payment of the money in court and tendering the same to plaintiff's attorney is not a lawful tender in this case." The court refused so to instruct.

The jury returned the following verdict:

"We, the jury, find the defendants guilty of the trespass complained of, except as for the land included in the roadway of the St. Louis and Iron Mountain branch railroad, and assess the plaintiff's damages at twenty-six dollars."

SCOTT, J., delivered the opinion of the court.

This was an action of ejectment and trespass *quare clausum fregit*, to recover the possession of some land, and for damages for entering lands belonging to the plaintiff. The defendants, under a contract with the St. Louis & Iron Mountain Railroad Company, built a road connecting Potosi, in Washington county, with the main stem, not exceeding three or four miles in length. The company had the land, on which the defendants built the road, condemned under the pro-

visions of the general railroad act, approved February 24, 1853.

It is now objected to the condemnation that the charter of the St. Louis & Iron Mountain Railroad Company did not authorize the building of the branch road from Potosi to the main stem; that the company could not delegate to the defendants the right to construct the branch road; that it was a private enterprise of no public utility, for which private property could not be taken.

Waiving the inquiry whether these objections are well founded in the law and the facts, we will examine whether the propriety of the proceedings taken for the condemnation of the land of the plaintiff can be inquired into in this action. The condition of railroad companies would be a hard one, if they could not be assured, before a road was built, that they might rely with confidence on the validity of the condemnation under which they acted. If the law, under which they proceed, is a valid and binding one, and they conform to its provisions in condemning the land necessary for their purposes, it would be ruinous if the validity of those proceedings could be called in question in a collateral suit. One of the consequences of holding that a party could be held liable as a trespasser or a wrong-doer while acting under a condemnation conformable to the statute, would be that the party complaining of the injury might, in the exercise of his rights of peaceably redressing his own wrongs, enter upon a railway and abate it as a nuisance: 3 Blackf. 5.

A railroad company would never be safe in building a road. After condemning land under a law which authorized it, they would be left to the fluctuating opinions of the courts, and would have no assurance that the steps they had taken would be of any avail in a subsequent action against them. If the construction of railroads is a measure encouraged and promoted by the community as one in which its interests are involved, there would be no policy in leaving companies in this defenseless state. There is no hardship in this on him whose property is condemned for the public use. The legislature can exercise the right of eminent domain providing just compensation for private property taken or applied to public use. They can make laws providing how

this right shall be exercised. If the party to be affected by the exercise of it has notice, he can make all objections to the proceedings of the body discharging this duty. If he fails to make objections, or if his objections are made and overruled, on what ground can he recur to those objections in a collateral action?

If, when the proceedings condemning private property for public use are reported and confirmed, they do not protect the companies entering on the land taken, of what use are they? In building roads companies should have an assurance that they are not at the mercy of those whose property may be applied to their use. The statute, under which the proceedings were had in this case, declares that they shall be final and conclusive. In the case of *Hamilton* v. *The Annapolis and Elk Ridge Railroad Company*, 1 Mary. Ch. 107, it was held that, the land having been condemned for the use of the road, and the inquisition returned to and duly confirmed by the proper county court, the propriety of the condemnation and use of the property could not be drawn in question in an incidental or collateral proceeding. The law is stated to the same effect in Redfield on Railways, 129, 684.

We see nothing erroneous in the conduct of the court in relation to the payment or deposit of the damages assessed to the plaintiff. The statute provides that the court shall direct to whom the money is to be paid, or in what bank or banking house, and in what manner it shall be deposited by the company. The order made was, that the company deposit with the clerk of this court forthwith, to the credit and on account of the defendants, the said sum of nine hundred and twenty-five dollars, to be paid over to the defendants.

This was in effect an order directing the money to be paid to the defendant; and, if he refused to take it, we see no impropriety in its remaining with the clerk to be paid when called for. The clerk stated that he still holds the money ready for the plaintiff in this action. His attorney refused to receive the money on his account. Being a party to the proceeding, he knows where his money is, and that he can have it at any time. Under such circumstances, after doing all that could be done, it is now very unreasonable that the point should be made that the order did not justify the court in di-

recting the jury that it was a full justification to the company to enter upon the land condemned.

The court instructed the jury that the title vested in the company conferred on it the right to all minerals, etc., found within the line of said roadway. The land over which the road passed was mineral land. That fact we suppose was known to the commissioners, and they would regard it in estimating the damages assessed for the plaintiff. The mineral found below the bed of the road, and whose excavation is not necessary for the construction of it, would remain with the owner of the soil; but, as to the portion that must be removed in order to build the road, we do not see on what ground the owner of the soil can claim it, more than the earth or rock that is removed. We do not see on what principle the ownership of the excavations can be made to depend on the question whether they are necessary or not in the building of the road. When the land is condemned, it is condemned to the bed of the road and the property of that which is condemned vests, when the damages are paid or secured, without regard to the inquiry whether or not it will be necessary in the construction of the road. Whether the instruction of the court was right or wrong, as it appears that no mineral was taken from beneath the level of the road, the plaintiff was not injured by it. If the excavations belong to the owner of the soil, would it not be right to place them on his ground, and how then would he complain that his land had been injured by placing them upon it? Are not railroad companies sued for such injuries? Redfield says, "It is certain in this country, upon principle, that railroad companies, by virtue of their compulsory powers in taking lands, could acquire no absolute fee simple, but only the right to use the land for their purposes; and it is very questionable whether a railway, in such case, is entitled to the herbage growing upon the land, or to cultivate the same, or to dig for stone or minerals in the land beyond what is necessary for its purposes in construction. In England the statutes give all such minerals to the former owner of the land, except such as are necessary in the construction of the road, unless the same shall have been expressly purchased; and in this country no doubt the same construction would be adopted in regard to all land taken by compulsory proceedings."

We do not see how the constitutionality of the general railroad law of February 24, 1853, can arise in this or any other case, when it is admitted that there may be roads to which its provisions may be constitutionally applied. It is conceded in the argument that the act would be constitutional when applied to the Pacific railway, because that road is for the general benefit, and private property may be taken for its use. But it is maintained that the same act is unconstitutional when applied to the road, the subject of this controversy, because it is a mere private enterprise in which the public have no concern, and therefore private property can not be taken for its use. If the road was of the character attributed to it, and lands should be condemned for it, that would not show that the general law is unconstitutional, but only that its provisions had been perverted to a case to which they could not be constitutionally applied.

The constitutionality of a law depends upon the terms in which it is written. If there is a state of circumstances to which it may be applicable consistently with the constitution, it is no argument against its validity that it may be perverted to cases not warranted by the constitution. If the law is applied to such a case, that does not make it invalid, but only shows that it has been misconstrued and perverted to a case to which, by the constitution, it was not applicable. The constitutional validity of a law can not depend on extrinsic facts or circumstances, but those facts and circumstances may determine the constitutionality of its application to any particular case.

It follows, then, that whether the general railroad law could be made applicable for the condemnation of the road, the subject of this controversy, was a question involved in the proceedings of the commissioners, and as those proceedings stand confirmed, it, no more than any other question involved in them, can be made a subject of investigation in this controversy, they being final and conclusive.

Judgment affirmed.

The other judges concur.

SEARLE v. THE LACKAWANNA AND BLOOMSBURG RAILROAD CO.

(33 Pennsylvania State, 57. Supreme Court, 1859.)

[1] **Measure of damages—Unopened mines.** In estimating the damages that will be sustained by the construction of a railroad through the property of a land owner, the jury may allow the party the market value of the land taken, and all actual damages arising from the manner in which the road passes through the property and affects the improvements, but they are not at liberty to estimate the value of unopened mines, as mines, or to estimate that there is a certain value in coal under the surface, and so raise the *quantum* of damages above the present salable value of the tract condemned.

Future inconvenience. Nor is it a subject of damages that the owner, when he begins to open his mines, will find the road-bed an obstruction.

Idem—Condemnation of way over coal lands—Title to coal. Where there are unopened coal veins on a tract of land over which a railroad is condemned, the case may be treated as one of wild lands, and the further inconvenience to opening the mines from the grade of the road-bed, etc., can not be considered. As to the minerals themselves, the railroad "gets no title to the coal further than it is needed to support the surface."

Error to the Common Pleas of Luzerne County.

This was a proceeding under the act of 19th February, 1849, by Daniel Searle against The Lackawanna and Bloomsburg Railroad Company, for the assessment of the damages sustained by the construction of the defendants' road through the plaintiff's land.

The plaintiff was the owner of a tract of coal land, containing 91 acres, 111 perches, situated on the feeder of the North Branch canal, in the township of Pittston, Luzerne county. In 1855, the defendants, having first given security for the plaintiff's damages, constructed their railroad through the tract in question, taking a strip about sixty feet wide and crossing it nearly at right angles with an embankment of about four feet high, extending half way across the lot. The plaintiff's ground had been used for agricultural purposes, no mines having been opened on the land.

[1] *Haslam* v. *Galena Co.*, 64 Ill. 353.

On the 17th May, 1857, the plaintiff petitioned for the appointment of viewers to assess his damages, and subsequently appealed from their report.

On the trial of the appeal, the plaintiff, as one of the items of his damages, offered to prove that the tract in question was coal land, and that the defendants' railroad crossed it in such place and manner as materially to increase the expense of mining his coal. To this offer the defendants objected, except as to its being coal land, on the ground that the damages claimed were speculative, which might never accrue; and that consequential damages were not recoverable. And the court below rejected the evidence, and sealed a bill of exceptions.

The plaintiff then offered to prove that at least one acre and 149 perches of coal of the value of $4,000 or thereabouts, underlying the tract of the railroad, must be left for its support, and was consequently wholly lost to the plaintiff.

The court rejected the evidence and sealed another bill of exceptions.

The plaintiff presented the following points, upon which he requested the court to charge the jury:

1. Where the legislature provides a specific remedy for the recovery of damages for injuries sustained from a railroad company, the *statute*, and not the common law remedy must be followed.

2. If in enjoying the plaintiff's land as coal land, it shall be found that the defendants have materially injured the property by locating and building their railroad upon it, the plaintiff, nevertheless, can have no right of action hereafter for such injury.

3. A corporation duly chartered is not liable for consequential damages occasioned by the building of a highway, further than is specifically provided by the law itself.

4. The defendants being incorporated under the general railroad law of the Commonwealth, are answerable in damages, direct or consequential, upon the building of their road, to the plaintiff, only in the present action.

The court below, CONYNGHAM, P. J., delivered the following charge to the jury:

"It is not denied that, under the charter of defendants, they

have constructed a railroad, and if by so doing they have done injury to the plaintiff, for all injuries required to be compensated by the statute incorporating the company, he is entitled to recover here.

"In 1807 this tract of land was patented to Isaac Wilson, as whose property it was afterward sold by the sheriff to Amzi Wilson, who, in 1826, conveyed the same to Daniel Searle, the plaintiff, who, by his tenants, has been in possession since that time. He has thus, in law, established a good title to the land, for injury to which he claims damage.

"Has the plaintiff, then, sustained damage by the laying out and construction of the road?

"The defendants have taken of his land nearly two acres, which they have fenced and inclosed, and for this he is entitled to receive the fair value, unless benefits by the road have accrued to him which would overshadow or exceed it.

"What is the value of this land? We refer you to the testimony; this value has been given regarding it, both as agricultural and coal land. It is worth more for coal under the ground, than for the mere surface. The company, by taking the land, obtain no right to the coal; they can not mine and carry it away; but so long as they choose to keep up their road, and occupy the land by it, they withhold the land from the owner, and without some other evidence than appears here, we do not see why the value of the land, as it is with the coal under it, estimated comparatively with the whole tract, is not the true subject for the consideration of the jury. There is nothing to show here that the owner can take out any of that coal without such risk of injury to the railroad that the law would not permit him to do it.

"The true question or mode of valuation is, as most of the witnesses have given their estimates, valuing it by the acre, as the other land belonging to the plaintiff and forming the residue of the tract, of the same character and value, as land, is valued at.

"What, then, is the fair value of the property taken? This is for you to ascertain, under the evidence.

"There is also another legitimate question or claim for damages—the manner in which the other land or the tract is cut up and divided by the railroad, and the inconveniences

which a farmer of the tract may necessarily sustain by the crossing, going to and coming from the back part of the property. This also has been estimated by witnesses, and is to be judged of by you.

"The amount of damages to which the plaintiff is entitled are to be estimated as to the time of the completion of the road, and interest allowed on them to this time.

"A claim has been advanced here for alleged injury and difficulty arising out of what may be called estimated mining rights and privileges. The court heretofore, on the trial, rejected evidence of this kind when offered as a distinct ground for claiming damages, to be compensated in money, to the plaintiff. The court then said that Mr. Searle, having no mining works in operation, no coal opened for mining purposes on his land, but his coal all being covered up by the superlying soil, and known to be there only by the judgment and examination of experts, was not so injured by the making of the road *herein* that his injury could be considered capable of ascertainment now, and could be recovered here. The Supreme Court have said that remote, contingent and speculative damages can not here be claimed; and we repeat, while some evidence upon this subject came out in the explanations given by the witnesses of the grounds of their opinion as to the amount of injury to the property, and of the same character as that which the court rejected in chief, that these alleged difficulties and sources of injury to a mere estimated mining right, which may hereafter, or which may not ever be carried on, are not to be considered by you in making up your estimate of any sum which you may think the plaintiff entitled to recover here."

The learned judge here read to the jury the points submitted by the plaintiff, and continued: "We say that these points are, in the abstract and substantially, correct; except that we qualify the last point by saying there are some consequential damages which arise from the *use* of the road hereafter, for which the company may be liable in other actions. If the point means to refer only to the damages, which have been made to appear in this case depending only upon the *construction* and *building* of the road, the point is correctly stated.

"There is still, however, another subject of inquiry for the jury. The defendants admit that the land of the plaintiff has been taken for their road, and that, unless other circumstances be considered, the plaintiff could demand damages for so taking it. The act under which the defendants claim their charter requires that, in estimating the damages by the making of the road, a fair and just comparison of the advantages and disadvantages of the same to the owner of the land, is to be made. We read a portion of the 12th section, Act of February, 1849, *Brightley's Purdon*, 130, as far as it has relation to this question. The defendants say that the advantages of this road to Mr. Searle are greater than any damages which he has otherwise sustained. These advantages, and also disadvantages, other than those which, as proved here, we have instructed you to value in money, are, to a certain degree, prospective, contingent, and merely speculative. The railroad, perhaps, has not yet been of any direct benefit to Mr. Searle, except, it may be, in the increased value of land which he has not sold, but still holds, yet the defendants have the right now to ask you to consider this as an advantage to the plaintiff if you so find the fact to be. So we say to you that, in answer to the claim of advantages, the plaintiff may ask you to consider disadvantages, not capable of certain calculation, and to a considerable degree contingent and speculative. In a case like the present, where the defendants claim that the road is an advantage to the plaintiff on account of this tract being a coal tract, and therefore made more valuable in consequence of its ability to be mined and worked as such hereafter, by the road furnishing a means for the transportation of the coal (whether it will be so worked or not, conceded to depend upon a contingency, yet its ability thereto, being an advantage, in consequence of presently increasing its value); if you find that the construction of the road, from the testimony of witnesses as to contingent damages, has injured the mode and previous opportunities of mining coal, and conveying the same to market by the canal, by opposing obstructions to the proper mode of reaching the canal; we do not see why you may not consider these disadvantages, contingent and indefinite as they are, in making a 'fair and just comparison' of the claim for advantages arising from evidence of the same general character.

"You will understand, if in comparing these matters together you find the contingent disadvantages equal to the claimed advantages, so far will be found an answer to the claim for advantages; if the contingent disadvantages exceed the advantages in your opinion, it will merely do away with such claim of the defendants, but will give no ground for substantive recovery of damages in money from the defendants. The evidence of these matters, which might have been proper as answering evidence, and which, as we have said, came out on the cross-examination of some of the witnesses, was rejected by the court, when brought forward as a ground for distinct damages, should the disadvantages exceed or equal the advantages; then the question of actual damages to the property upon the principles stated in the earlier part of the charge, will remain for your ascertainment.

"In a case like the present, where, under the evidence given in the cause, the actual damage proved is to land taken for railroad purposes, and as the road is located over the farm of the plaintiff, when you come to ascertain the actual damages, and also to inquire into the attendant advantages and disadvantages, a proper rule for your government is thus laid down by our Supreme Court in the case of *Railroad Co.* v. *Heister*, 8 Barr. 450: 'A fair and just comparison of the value of the tract through which the road passes, before and after the improvement is made. Is the property benefited or injured by the improvement, is a most material inquiry. If benefited, the owner neither is, nor ought to be, entitled to recover any compensation whatever; if really injured, not a mere fanciful injury,' (and we add, not a mere supposed injury dependent upon a contingency or uncertainty, as already explained to you), 'compensation is to be given to the amount of the damages sustained by the owner. In coming to *your* conclusion, *you* may properly inquire what the property would sell for before and after the improvement is made and the road in successful operation,' always considering, too, where there are different improvements, whether this increase in value, if any be found, arises from the particular improvement in question, or from other causes."

To this charge the plaintiff excepted, and a verdict and judgment having been rendered for the plaintiff for $300, he

removed the cause to this court, and here assigned for error: 1. The rejection of the evidence offered on the trial. 2. The charge of the court below.

HARDING and G. B. NICHOLSON, for the plaintiff in error.

H. B. WRIGHT, H. M. HOYT and S. WOODWARD, for the defendants in error.

The opinion of the court was delivered by LOWRIE, C. J.

This case is very defectively presented in the plaintiff's paper-book, for it gives us no part of the evidence on which the cause was tried, and does not enable us to consider the rejected offers in their regular connection, or to compare the charge with the case before the court. We could not, therefore, consider the plaintiff's assignments of error here, were it not that his defects are supplied by the defendants' paper-book.

The claim is for damages for taking part of the plaintiff's land in making the defendants' road; and by the principles of the judge's charge, the jury were allowed to find a verdict for the value of the land taken, and for all the actual damages arising from the manner in which the road went through the plaintiff's land and affected his improvements; and to measure even imaginary and contingent damages against the probable advantages or facilities that the improvement might occasion. We can not say that we discover any error in all this.

But the court rejected evidence that there was over an acre of coal under the road, worth $4,000, which would be lost to the plaintiff, because necessary to be left for the support of the road.

Now, if such a fact were necessary to the ascertainment of the value of the land taken, it would be wise to accept the testimony of experts, for we ought always to seek the best sources of information. The objection is not to the experts, but to the facts themselves. We do not measure the value of land by such facts. Land may have $4,000 worth of coal per acre in it, and yet sell at $40 per acre.

When a man has to sell his property, of course he must take

the market value for it. That is measured by the custom or common dealing of the country. If it is land the market value is measured by the price usually given for such land in that neighborhood, making due allowance for differences of position, soil and improvement. Value may be very approximately estimated in that way, for it is not then founded upon the mere opinion of witnesses, but on the fact of a general market value.

When the State takes private property for public uses, or authorizes it to be taken, this market value is all that it pays for it. This is the necessary measure, in order to avoid the favoritism or oppression that would attend any other measure. Every man holds his property subject to this eminent domain, dominion or ownership of the whole society. He must give it up when society needs it, on being paid its value according to the estimate put on it in the market, that is, by common consent.

On the subject of taking land for public uses, the French have a very carefully prepared system in their law of 8th March 1810, *sur les expropriations pour cause d'utilite publique;* and it directs the market value to be ascertained by reference to recent actual sales in the neighborhood, by the tax lists and other documents, with the aid, if necessary, of experts or persons whose business it is to deal in such values: Art. 16, 17.

In the present case, the jury were permitted to find in favor of the plaintiff the full value of the land, as coal land; though the defendant gets no title to the coal, further than it is needed to support the surface. Then the plaintiff has been allowed the full value of the land, as estimated by the common standard; and we do not see how we can take any other. The one here proposed has never been publicly sanctioned, and that is something against it. It would require us to ascertain the possible value of the products of the land in order to get at the value of the land itself. But the products do not exist, and therefore have no value, for value here means value in money in the market, and this can not apply to products not yet in existence. And then to use the products as a standard of value of the land, is to apply an uncertain measure in order to obtain a certain result. It is easier to value the land directly than thus.

Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity would not help us to value the land. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful.

There was another offer, to show that the railroad of the defendants crosses the land in such place and manner as to materially increase the expense of mining the coal in the land.

We understand from the opinion of the court below, that this means that if at any future time the plaintiff shall undertake to mine the coal in his land, he will be put to great expense in getting it across the road for transportation to market; and for this he wants compensation.

There is no special allowance in the act of assembly for supposed injuries of this kind; and if the common law does not recognize them as injuries, we do not see how it is possible for the court to allow compensation on account of them. To ascertain the common law, let us see what is the usual mode of proceeding in such cases.

The State allows for all actual damages to existing improvements, especially in case of railroads; and that has been done here. But, so far as regards the unopened coal veins on this land, we may treat the case as one of wild lands. Over such the State makes its roads, with simple reference to public convenience. It allows no damages on account of the fact that when the owner comes to improve, he must go to great expense in adapting his improvements and his roads to the public road. It counts not at all on the minerals under the road; to do so would obstruct all improvement of such land, and yet mineral lands must have roads, as well as other lands, and on similar terms. It cuts through high ground and fills up

low, without allowing for the difficulty which the owner may some day have in getting at or over the road. It usually does the same, even through improved lands: 8 W. & S. 85; though it does not always permit railroad companies to do so: 16 State R. 191.

In relation to wild lands, such operations are no present injury, except in a purely imaginary sense. They may some day prove an obstruction; and yet it is impossible to tell what changes of roads and other avenues of communication, and what changes in the value of the land and of its products may take place before that day arrives; and it is impossible to decide now what the injury would then be, or that it would be any. It may be, that before this coal begins to be mined, the surface will be occupied by improvements needing this road, and presenting themselves greater obstructions to mining than the road is, because the mining must regard their safety: 12 Q. B. 739.

We can not say that we discover any error in the case.

Judgment affirmed and record remitted.

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[1]BAGNALL ET AL. V. THE LONDON & NORTHWESTERN RAILWAY CO.

(7 Hurlstone & N. 423. Court of Exchequer, 1861.)

Ulterior damage from railway by seepage from road-bed into mines. A railway company in constructing its road-bed cut the soil down till they reached a porous stratum of rock; through this rock water penetrated into plaintiffs' mines; the railroad were required by their act of Parliament to make and maintain sufficient drains; they had also the option under their act to purchase the mines; at time the road was built, the mines were not worked within forty yards of the bed; the company had declined to exercise their option to purchase. The mines were damaged by the percolation through the porous soil and the want of sufficient drains: *Held*, that the damages were not covered by the original compensation money.

This action was brought to recover damages for injury to mines worked underneath a railroad bed.

The opinion states the facts.

[1] Affirmed, 5 M. R. 366.

GRAY & MACNAMARA, for plaintiffs.

BOVILL & PIGOTT, for defendants.

BRAMWELL, B.

The material facts in the case are as follows:

The plaintiffs are owners and occupiers of a coal mine. The surface soil as well as the coal below formerly belonged to the same owner, but a railway company (to whose rights and obligations the defendants have succeeded) took the surface under the powers of a private act of Parliament for their railway, and constructed it thereon. The railway company (by which may be understood, indifferently, the original company or the defendants) cut and removed upward of twenty feet in thickness of the surface soil over where the plaintiffs' mine now is, to get the level at which they laid their rails.

This surface soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the railway company along the length of the line to a lower district of country, through which a brook flowed. Here the railway was on or above the natural level of the ground. It was carried over the brook by a flat bridge. The line of the railway sloped downward from the bridge to the part over plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, and even more, but was an impediment to the passage of water in large floods. The railway company was bound to make and maintain drains, the obligation being substantially the same as in the Lands Clauses Consolidation Act.

A flood happened in 1860, and the result of the combined acts of the company was, that water, part of which would have escaped but for the bridge, flowed down the railway, and, the high ground between the brook and the surface over the mine being removed, it reached that spot, and the high ground and protection of clay then being gone, and the drains being imperfect as after mentioned, it penetrated into the mine. So also did the water falling on the spot itself and the springs arising in the cutting. But it here becomes necessary to mention that when the railway was making, the mines were not worked under nor within forty yards of the railway.

The railway was made with drains at the side sufficient to carry off the water which fell or came there without doing any mischief as the matters then stood. When the plaintiffs' workings came to forty yards from the railway, they gave the defendants notice under their Local Act, which may be treated as substantially the same in its provisions as the Railway Clauses Consolidation Act. The defendants, however, did not purchase the mines. The plaintiffs accordingly worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sunk and continued to do so from time to time. The defendants repaired this by throwing material of a porous character on the sunk parts; they did not, however, repair and puddle the drains, which, from the sinking of the soil, became inefficient, and even had they been efficient they would not have carried off the flood-water of August, 1860. For the damage sustained from the water thus getting into the mines, this action was brought.

It seems to us impossible to state these facts without showing that the plaintiffs have a claim on the defendants of some kind. Without any fault of theirs, the natural condition of things had been altered, the water of the brook which flowed at a distance of one third of a mile from their mine, inaccessible to it by being separated from it by ground twenty-five feet high, has been diverted over it, its natural covering and upper soil removed from it. From the last-mentioned circumstance, and want of efficient drains, the rain which fell on it and the springs which arise in the cutting have got into it. These are the acts of the railway alone. It is said that the plaintiffs have brought about the mischief by working their mines, but they had a right to work them as they did. They lose no right by doing so. It could not be contended that, had the defendants thought fit to agree to purchase they could have done so at a nominal price, on the plea that if the plaintiffs worked them they would be worthless, as they would be drowned. We do not say that the defendants were bound to restore the surface. They might have diverted their line and left hollows over the spot in question, but they were bound by their act to make and maintain effectual drains.

This reasoning applies to the water other than that from the flood. As to that the plaintiffs case is still clearer. Suppose, instead of the defendants' railway passing through the cutting and over the brook, it had been a branch railway belonging to a private proprietor and adjoining the defendants' railway just before reaching the plaintiffs' mine; would not such private proprietor have been clearly liable to this action, and if so, why are not the defendants? As to this flood-water, they are not sued merely as the railway company who had taken the surface of the plaintiffs' land, but as persons who, by their acts on land at a distance, have done this injury; and it seems to us they would be liable for the damage by flood-water if the plaintiffs had continued owners of the surface, and for some reason had thought fit to remove it to the depth the railway company has; for it would still be acts of the defendants which sent the water there.

But it was suggested that if the plaintiffs had a claim it was to be enforced under the compensation clauses. We think not. The plaintiffs are not injuriously affected by the *works* of the railway company. Supposing the company had possessed no statutory powers, they could not have been restrained by injunction from executing any of those works, nor could any action have been maintained against them singly for their construction. The railway company would have been entitled to say: "These are not injurious and never will be. By means of puddling the surface and drainage no water will ever reach you." Nor need it, as appears.

It is not, therefore, the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrongful conduct in relation to them, in not making and maintaining outlets for the flood-water or draining it off the plaintiffs' land, or covering the surface thereof with clay, and in not maintaining those drains which were efficient to carry off the rain which fell, and the spring water which arose there.

Our judgment, therefore, is for the plaintiffs in respect of both these claims.

Judgment for the plaintiffs.

[1] BAGNALL ET AL. v. THE LONDON & NORTHWESTERN RAILWAY CO.

(1 Hurlstone & C. 544. Exchequer Chamber, 1862.)

Unforeseen damage from railroad construction and operation. Damage to mines caused by the construction of a railroad, of such nature that they could not be foreseen at the time of the laying out of the road, and *a fortiori* damages from negligence in the care and management of the line, are not included in the compensation clauses of the railway acts, and the company is liable, therefore, upon action brought.

Option to purchase. When a railroad company decline to purchase mines under a statutory option, they must leave the mines intact.

This was a proceeding in error on the judgment of the Court of Exchequer for the plaintiffs, on a special case stated for the opinion of that court. The pleadings and facts sufficiently appear in the report of the case in the court below. (7 H. & N., 423.)

The judgment of the court was now delivered by WILLES, J.

In this case the conjoint effect of the making of the defendants' cutting, and of their neglect to keep their drains in proper order, has been that large quantities of water, which but for the cutting would not have come near the plaintiffs' mine, and but for the defective state of the drains would have passed away and been carried off without injury to the mine, poured down into and damaged the mine, for which damage the present action is brought.

The company had, upon receiving the statutory notice, declined to purchase.

The jury found (and upon this finding the question arises) the principal cause of the mischief to be that the drains had not been kept in proper order.

It was hardly denied, and could not successfully have been disputed that the company was liable to make compensation, and the main stress of the argument bore upon the question whether such compensation can be recovered as damages in this action, or whether the plaintiff ought to have proceeded under the compensation clauses of the Railway Act.

[1] Affirming, 5 M. R. 362.

Now the obvious intention of the legislature in giving the company the option of purchasing the mine was, that in case they should decline to buy, the mine owner should possess his property intact. If it were otherwise, the railway company would have it in their power to do indirectly what they are not permitted to do directly, namely, to take away the benefit of the mine, either in the whole or in part, without paying for, and after they had elected not to buy it.

And there are practical obstacles of an insuperable character against saying that there arises upon the making of the railway an immediate right to compensation, in respect of possible future injury to unopened mines.

At that time it does not appear that the mine will ever be worked, nor that the drains will not always be kept in proper order, so that the company might contend that peradventure no damage would ever arise, and an assessment of damage in advance would be sheer speculation. This consideration distinguishes the present case from that of *The Caledonian Railway Company* v. *Lockhart*, 3 Macqueen, 808, where the embankment could not have been made without exposing the land to damage by periodical floods, which were certain to occur, and the deterioration in value and disability to work might at once be calculated with reasonable certainty, and brings it within the authority of that class of cases in which it is held that damage caused by a negligent and improper exercise of the powers of the act, forms the proper subject of an action. *A fortiori*, this is so where the negligence is in the care and management of the line, not in the construction of the works.

That was the course of reasoning by which the Court of Exchequer arrived at the conclusion that the defendants were liable in an action, and upon consideration we are satisfied that their judgment was correct. It must therefore be affirmed.

Judgment affirmed.

BROWN v. COREY ET AL.

(43 Pennsylvania State, 495. Supreme Court, 1862.)

Practice—Withdrawal of appeal. An appeal from a report of viewers, under the Lateral Railroad Law, can not be withdrawn after the time has elapsed in which the opposite party might have appealed, without the written consent of such opposite party.

[1] **Underground right of way.** The owner of a stratum of coal is an owner of land; and an underground right of way through his vein may be condemned.

Lateral railroads—Private contracts. An entry on land of another to build a lateral railroad, connecting mines with highways, is an entry under the State in its exercise of the right of eminent domain, in pursuance of public law, and all private contracts are subordinate thereto.

[2] **Measure of damages.** Upon the condemnation of a tract of coal severed from the surface, the measure of damages is the injury done to the whole tract, or the difference between its value at the time of the entry and its value after the completion of the road; and the inconvenience to the future working of that part of the tract not taken, is to be considered.

Underground railroad crossing—Evidence—Experts. When it is sought, in the exercise of eminent domain, to construct an underground railroad, crossing the railroad of a coal mine owner, down in the mine, "the dangers and delays of crossing the plaintiff's road" are fit matters to be considered by the jury, aided by the testimony of skilled witnesses, in arriving at the measure of damages. Such dangers and delays may be reasonably anticipated, and the plaintiff is not bound to wait until their actual experience, when it would be too late for compensation.

Error to the District Court of Allegheny County.

This was an appeal by William H. Brown, from the report of the viewers appointed on the petition of James B. Corey and John H. Peterson, for a lateral railroad.

The issues were, *first*, in regard to the title of petitioners to the land and the coal claimed by them in their petition; and, *second*, should that issue be found in favor of petitioners, then the jury was to assess the damages which Brown would sustain.

The petitioners claimed to own a river landing, containing about twenty acres and about fourteen acres of coal under surface of D. Shaw, assignee of Moses Corey; also a larger body of coal in the rear, under the surface of Bowman and

[1] *Valley Co.* v. *Brown*, 5 M. R. 397.

[2] *Whitehouse* v. *Wolverhampton Co.*, L. R. 5 Ex. 6.

Gray between which and their Shaw coal intervened the coal of Brown, lying under surface of M. Corey's assignee. The proposed road began at the Monongahela river landing, passed over the twenty acres of surface, through the fourteen acres of petitioners' coal, then directly through the center of Brown's coal to the Bowman coal tract.

To sustain the issue upon their part as to title, the plaintiffs offered a deed to them for the coal under the Bowman tract, dated September 30, 1859; and to show the title in them to the landing and the Corey coal, they offered a deed from Isaac Gill to Moses Corey, dated December 2, 1851, the voluntary assignment of Moses Corey to D. Shaw, January 7, 1856, and a deed from D. Shaw, assignee, to petitioners, for the premises, dated August 2, 1859. These deeds were read under exception by defendant as not being sufficient record evidence of title. The plaintiff also offered evidence as to possession under the said deeds and rested.

The defendant then offered a deed to him from Moses Corey, dated December 6, 1851, and duly recorded, conveying the coal through which the proposed road passed; also an article of agreement from said Corey, of same date. This deed and agreement contained sundry covenants on the part of Corey, looking to and facilitating the mining of the coal then purchased by Brown from Corey, which coal mine Corey had previously opened and partially mined.

The defendant then offered to prove that the construction and use of the road prayed for would destroy or very materially impair the value of the coal purchased by the defendant Brown, from Moses Corey, and would materially impair, if not wholly destroy the rights, privileges and covenants granted and made in said deed from Corey to Brown, among other things in this, that the greater portion of said Brown's coal could not be taken out except at such risk and expense as would render it almost if not altogether valueless, and that the remainder would not be of sufficient value to justify the construction of a road and improvements to take it out for market, all which was offered for the purpose of showing, in connection with said deed—

1. That petitioners are estopped from prosecuting their said petition.

2. That petitioners have not such ownership of certain portions of the coal and land described in their petition as entitles them to prosecute their petition; and—

3. Also, by way of establishing the amount of damages which defendant will sustain by the opening, constructing and using of the road prayed for.

To which plaintiffs' counsel objected—

1. That it is wholly incompetent for the first purpose, the plaintiffs claiming no right to build their road under Moses Corey, the grantor in the deed, but under the authority granted them by the Commonwealth.

2. That it does not tend to impeach the ownership of plaintiffs in any of the lands or minerals described in their petition, as alleged in the second purpose.

3. That for the third purpose the offer is too indefinite, not specifying the character of the damage done, by which the land is said to be depreciated in value. That the owner of mines is not entitled to damages on account of increased expense and inconvenience in working unopened mines, when he begins to work them.

Which objections were sustained, the evidence rejected and a bill sealed.

The defendant subsequently renewed his offer of this testimony, to be followed by proof that previous to the filing of the present petition and to the purchases of coal by petitioners, as given in evidence by them, the defendant had surveyed and laid off a railroad from the river to the coal purchased by him from Corey, with regular plans for a double entry through the said coal, intersecting nearly at right angles the petitioners' proposed road and had begun to open and construct his said road, under and by virtue of the grants and covenants in his deed from Corey, but was prevented from going on with said road by the force and threats of violence by the petitioners and their co-partners in their proposed coal operations.

That the construction and use of petitioners' road would destroy the value of defendant's coal; would render it valueless as regards market value; that the use of cross-entries under ground would be wholly impracticable.

That defendant frequently applied to petitioners to take out

his coal over their road, but that they have always refused to allow it and that the petitioners' road has not the capacity to take out any more coal than they can run and are now running day by day.

The plaintiffs objected to this offer, because—

1. The court has already ruled the former offer of defendants to be inadmissible and the offer is not cured by the offer of the additional evidence proposed.

2. The renewed offer contains matters irrelevant and incompetent; and,

3. The evidence in reference to damages must be confined to specific facts relating to actual damage. The present offer is entirely too general.

Which objections were also sustained and the evidence rejected.

Defendant then offered to show by deeds and diagram the quantity and extent of the coal owned by him now and for a long time previous to the filing of this petition and the laying off of petitioners' road; that the coal of defendant lies in one connected body, as shown in the diagram, to be followed by proof that owing to the dip of the coal and its peculiar location, it is not practicable to take any of it out, except through entries which will intersect the petitioners' road.

The plaintiffs' counsel objected to the above offers as incompetent and irrelevant, because—

1. The defendant's deed, already in evidence, shows that the tract of coal through which plaintiffs' road is located, is a distinct and separate tract, containing fifty acres, and the same appears from the deeds and diagram now offered.

2. The deeds now offered are for a body of coal lying at a great distance from the said tract of fifty acres.

The court allowed the defendant to show the extent of the coal owned by him under the tract through which this road passes; but the rest of the offer was rejected.

Defendant then offered to prove that he was the owner before the filing of the petition in this case, of three hundred and twenty-five acres of coal in one body, through part of which the proposed road passes, for the purpose of showing what he owned, to be followed by evidence showing the direct injury done to said body of coal.

Plaintiff objected, that defendant has already shown by his deed in evidence that the body of coal through which said road passes is a distinct and separate tract of fifty acres, and in point of fact the deeds now offered, and the diagram already exhibited, show that any other coal owned by defendant constitutes a distinct body of coal not touched by said road.

The objection was sustained and the evidence rejected.

Defendant then offered in evidence a deed, dated December 6, 1857, from Moses Corey and wife to William H. Brown, and also as part of said deed and title, an agreement of same date between same parties, for the purpose of showing the extent of defendant's title to that part of defendant's body of coal embraced in said papers, and the extent of the rights and privileges appurtenant to said coal and acquired by defendant under said papers, to be followed by proof of the market value of said coal as enhanced by said rights and privileges.

To which plaintiffs' counsel objected—

1. That the said deed is already in evidence.

2. That plaintiffs do not question defendant's title to the fifty acres of coal through which their road passes, but in their petition aver that he is the owner thereof, and—

3. The article of agreement is irrelevant and incompetent, and refers to rights and privileges outside of said tract of coal and not affected by said road.

The objection was also sustained and the evidence rejected.

The defendant then proposed to ask one of the witnesses what would be a reasonable use of the plaintiffs' road, in order to make it worth their while to run it; or, in other words, how much coal is ordinarily run upon a road like this, connected with mines such as those of the said plaintiff; and this for the purpose of showing the depreciation in value of the defendant's coal mine, and one of the reasons of that depreciation; which offer was objected to as incompetent and irrelevant and because the question is hypothetical and can only refer to speculative and imaginary damages.

The objection was also sustained and the evidence rejected.

The defendant then offered to ask the witness on the stand the following question: Taking it for granted that Corey & Peterson have the right to run as much coal over their road

as it is capable of carrying, what is the value of Brown's coal with Corey & Peterson's road running through it, and in use by them?

To which the plaintiffs objected that the witness has already stated that the only reason why the value of the coal is depreciated is the contingency of the construction of another road crossing plaintiffs' road, and the interfering operations of the two roads, and that the question is incompetent and irrelevant.

This objection was also sustained and the evidence rejected.

The defendant also offered to prove by the witness that there is no other mode of access to the defendant's coal which would make it worth the expense of carrying to market, except by means of a railroad crossing that of the plaintiffs nearly at right angles; and that the effect of the construction and use of the plaintiffs' road is largely to increase the difficulty of access to the coal of the defendant.

To which plaintiffs objected that the offer is substantially the same as that which has already been repeatedly overruled, and relates to future and contingent mining operations, and also for general irrelevancy.

The objection was sustained and the evidence rejected.

Defendant also offered to prove that previous to the laying off of petitioners' road, defendant, with the full knowledge of petitioners, had laid off and surveyed a road leading from the river up to and through the fifty acres of coal purchased from Corey, and directly across the proposed road, and had entered upon its construction, but was driven off by the threats and violence of petitioners and their co-partners; and further, that the coal purchased by him from Corey had been opened and worked by Corey previous to defendant's purchase, which opening and working it was the purpose of defendant's new road to carry on and continue; to be followed by proof that the construction and use of petitioners' road would wholly obstruct defendant in the use of his proposed road, by crossing it at right angles, and would render the fifty acres of coal valueless by reason of such obstruction, for the purpose of showing the damages which defendant would sustain by the use of petitioners' road.

This was objected to as irrelevant and incompetent, and as already overruled; which objection was sustained, and the evidence rejected.

The defendant's counsel thereupon moved the court for leave to withdraw his appeal from the report of viewers, and that the court confirm the report, to which the plaintiffs' counsel objected.

The court refused *pro forma* to allow the withdrawal of the appeal, reserving the question for the court in banc, and directed the trial to proceed.

The defendant's counsel then requested the court to instruct the jury—

1. That there is nothing in the acts of assembly relating to lateral railroads, to authorize a proceeding against the owner of a stratum of coal as contradistinguished from the proprietor of the land, the said acts applying only to the land owner, and awarding damages only to him.

2. That the seizure of private property for private use has no warrant in the constitution of this State, and is at war with the object of all just government, and the fundamental law of the social state; and that if it may be so seized, it may be as well seized without compensation as with it.

3. That under the acts of assembly governing cases of this sort, the true measure of damages would be the difference between the value of the coal as unaffected by the construction and use of the plaintiffs' railroad, and the value thereof as affected thereby; and that any depreciation arising from increased difficulty of access, occasioned by the construction and use of said road, is to be taken as a direct and immediate injury or damage thereto.

4. That the opinions of witnesses largely engaged in the business of coal mining, and conversant with the value of coal mines and the means of working the same, are entitled to great weight with the jury, and in the absence of contradictory or conflicting evidence are to be received and treated as conclusive by them, if not unreasonable or incredible in themselves.

The learned judge, after stating the case, charged the jury *inter alia*, as follows:

"The chief controversy in this case arises out of the question as to the measure of damages.

"Evidence was offered in a great variety of ways by the learned and ingenious counsel for the defendant to sustain his allegations, but was rejected by the court under the authority of recent decisions of the Supreme Court, as being too remote and contingent to form a legitimate element in ascertaining the damages occasioned by the construction and use of the plaintiffs' road. The defendant was allowed to prove what was the comparative value of his body of coal, before and after this road was made, as affected by its construction and use. And under this offer, which was admitted by the court, several witnesses testified that before this road was made, the defendants' coal was worth four or five hundred dollars an acre; and since that it would not be worth more than one hundred dollars. But when re-examined, they gave as the reasons or grounds of their opinions, the dangers and delays of crossing the plaintiffs' road; no other reasons were assigned, nor could be, under the circumstances of this case.

"These opinions, therefore, being based on imaginary and contingent facts, too remote and uncertain to sustain them, must be disregarded by the jury, inasmuch as the evidence offered to prove these contingencies was rejected by the court. The offer, as we ruled on the question of its admission, was right under the rule laid down by the Supreme Court in *Watson* v. *The Pittsburgh and Connellsville Railroad Co.*, 37 Pa. St. 469, but the mode of proof, as in that case, was defective.

"'The true measure of compensation,' says the Supreme Court, 'is the difference between what the property would have sold for unaffected by the railroad, and what it would have sold for as affected by it'; and this, we instruct you, is the law in this case. This is the great fact in the cause; but the mode of proving it must be governed by the rules of law regulating questions of evidence. The mere opinion of a witness, without facts to sustain it, is entitled to no weight with the jury, and these facts must be proved in the ordinary way.

"Now, if the defendant had opened his mine in the vicinity of the plaintiffs' road, and ascertained by actual experiment that its capacity was insufficient to accommodate both parties, this would have been a fact admissible in evidence; or if he had constructed his road across the plaintiffs' road

and found, after a full trial, that the two roads interfered with the working of each other, this would have been a fact susceptible of proof. But the defendant rested his case on the mere opinion of witnesses based on no ascertained facts. These supposed or imaginary facts might all vanish beneath the truth of actual experiment.

"I am not aware of any evidence in the cause that would justify a recovery in this case by the defendant of any damages beyond the actual value of the coal taken by the plaintiffs in the construction of their road, which would be a strip twenty feet wide, with interest thereon. This amount he is clearly entitled to recover.

"The court declines to charge as requested in the first and second points. The second point has no applicability to this case, it having been so frequently decided by the Supreme Court that the acts of assembly under which these proceedings were had are not unconstitutional, that it is entirely too late in the day to raise that question before this court. If the learned counsel can persuade the Supreme Court to overrule all their decisions on that subject, we will then listen to his proposition.

"The first branch of the third proposition has already been affirmed in the general charge. The latter branch might perhaps be true also, if the proof were sufficient to sustain it. But in this case it is not. It rests merely on the speculative opinions of the witness as to some imaginary difficulties that may never arise; on this sort of evidence we have already commented in the charge.

"The fourth point is sufficiently answered in the charge."

Under these instructions there was a verdict and judgment for plaintiffs, Corey and Peterson, and the damages of William H. Brown, the defendant, were assessed at $239.50. The case was thereupon removed into this court by the defendant, who assigned for error here the rejection of the evidence offered by him as above stated, and the refusal of the court to affirm the points presented as above; and also the refusal of the court below to permit him to withdraw his appeal.

BURGWIN & WOODS, for plaintiff in error.

PENNY & ACHESON, for defendant.

The opinion of the court was delivered by WOODWARD, J.

The defendants in error having become owners of certain coal lands lying in Versailles township, Allegheny county, within three miles of the Monongahela navigation, applied to the district court, under the Lateral Railroad Law, for a right of way, underground, through a stratum of coal owned by the plaintiff in error, William H. Brown. A view was had of the premises, which resulted in an assessment of damages to Brown of $2,500, from which he appealed on the 13th of March, 1860. On the trial of the cause in court, in April, 1862, he asked leave to withdraw his appeal, and prayed the court to confirm the report of viewers. Both requests were denied him, and the result was a verdict in his favor for only $239.50.

The refusal of the court to suffer a withdrawal of the appeal is now assigned for error. We think there was no error in this.

The act of assembly gives either party a right of appeal within twenty days after the report of viewers is filed, but if one party appeals the other need not. The cause is tried *de novo* on the appeal, the appellant possessing no advantage over the appellee by reason of having entered the appeal. If the successful party may appeal, and, after the twenty days have elapsed discontinue his appeal, he may thereby deprive his adversary of the re-trial to which he is entitled. If such a practice were tolerated it would lead to oppression and fraud. It has long been the policy of our statutes to forbid the withdrawal of appeals from awards of arbitrators without the consent in writing of the opposite party, and in *Monongahela Navigation Company* v. *Blair*, 8 Harris, 78, the same rule was applied to an assessment of damages in a corporation case. It is equally applicable to cases under the Lateral Railroad Law.

Brown owns only the coal seams through which Corey & Peterson sought to push their railroad, the title to the surface being in David Shaw; and it is insisted that there is nothing in the acts of assembly relating to lateral railroads which authorizes a proceeding against the owner of a stratum of coal as contradistinguished from the proprietor of the land.

By an act of 16th April, 1838, P. L. 637, the quarter sessions were empowered to lay out private roads, "under the surface of any land, to coal mines," and by the 2d section of the act of 28th March, 1840, Purd. 848, incorporated companies and individuals were authorized to construct railroads with one or more tracks "under the surface *over* any intervening lands, not exceeding six miles in length," the proceedings in such case to be according to the act of 1832, relative to lateral railroads. The word "over" in the act of 1840, is probably a misprint for "of." The surface owner, Shaw, is not made a party to this proceeding, and is not objecting to the road in question. How can Brown deny that he is an owner of "land"? He holds a conveyance duly executed and recorded for "fifty acres of merchantable block-stone coal," with rights of way above ground and under ground, through the lands of his grantor, and with privileges of drainage and ventilation, and he holds it all to himself, his heirs and assigns forever. In *Caldwell* v. *Fulton*, 7 Casey, 475, the nature of a mine interest severed from the ownership of the surface was very fully considered, and it was treated as a corporeal hereditament. Indeed it was said in terms that coal and minerals in place are land. There can be no question, therefore, that what Brown holds is within the very terms of the act of 1840, and being a coal bank, it is peculiarly within the spirit and intent of the act, for it was the purpose of all our legislation touching lateral railroads to bring coal and other minerals into market, and to this end every such road was designed to be a public highway, open to every transporter who would pay the legal tolls, as well as to the party whose capital constructed the road. Brown's coal needs a railroad for its outlet; there is far less reason for his objecting to the applicability of the acts of assembly to his mineral property, than there would be if he were a farmer on the surface, and the proposition were to run the road through his fields.

Another objection that he urges is founded in the covenants of the deed, by which Moses Corey conveyed to him the stratum of coal under the fifty acres in question. He claims that the petitioners, having purchased their landing and part of their coal from Corey subsequently to his (Brown's) purchase, were bound by Corey's covenants, as running with the

land. These covenants are the usual ones of seizin and warranty, and we do not see how they can estop the petitioners from proceeding under the Lateral Railroad Law. The argument seems to assume that the private property of Brown is to be taken for the private use of the petitioners; a thing which the legislature could not authorize to be done. If the Lateral Railroad Law had not been long ago rescued from this reproach, it had been condemned, long ago, as unconstitutional. It was founded in the experience of a great public want, and was passed for public purposes. Was not the development of our mineral resources a public object? Was it not a great public interest to augment the tonnage of canals and railroads, which had cost the State many millions to construct? The man whose minerals lay within three miles of a State canal but could get them into it only by crossing the intervening land of an unneighborly owner, had been taxed as well as his froward neighbor to build that canal; was it not reasonable and just to give him not a private, but a public way, he paying all damages he should occasion? Nobody will doubt the State might enter and build a railroad on his land; it is equally clear that the State might delegate her right of eminent domain to a corporation or an individual. But then the entry is under the State and in pursuance of public law. No covenants or private contracts between citizens can possibly be violated in such a case, because none can stand in the way of State authority. It is a resumption by the sovereign of a clear right of sovereignty, in subordination to which the covenants of the deed were made. Had the parties contracted expressly against the exercise of this right, they could not have bound the sovereign, much less can their covenants, made for other purposes, be permitted to have the effect claimed for them.

The main question below related to the measure of damages, and on this subject the record reads oddly. The petitioners having built their road before the cause was tried, the defendant made a great number of unsuccessful offers of evidence on the trial, with a view of showing that it had materially impaired the value of his property. These were rejected for the general reason that the circumstances to which the witnesses referred themselves, were too indefinite and specula-

tive in character. It would seem that several witnesses had been permitted to testify that the property was greatly depreciated by the construction and use of the petitioners' road, but on cross-examination, when pressed for the grounds of their opinion, they referred themselves to those circumstances, the direct proof of which had been rejected. "These opinions" (said the learned judge in his charge,) "being based on imaginary and contingent facts, too remote and uncertain to sustain them, must be disregarded by the jury, inasmuch as the evidence offered to prove these contingencies, was rejected by the court."

This put out of the cause the only evidence which the defendant had been permitted to give under the rule laid down by this court in *Watson* v. *The Railroad Company*, 1 Wright, 469, and enabled the learned judge to say, "I am not aware of any evidence in the cause that would justify a recovery in this case, by the defendant, of any damages beyond the actual value of the coal taken by the plaintiffs in the construction of their road, which would be a strip twenty feet wide, with interest thereon. This amount he is clearly entitled to recover."

The third point of defendants' counsel had called upon the court, in substance, to lay down the measure of damages, so clearly stated in that reported case. The judge recognized the case and quoted from it, but gave the defendant no benefit whatever from it, because his witnesses had formed opinions on facts which the judge thought were insufficient to sustain them. This court had said, in that case, "it is upon the whole tract the road is located, though only a part is actually occupied. The injury is therefore done to the tract *as a whole*, of whatever components that injury may consist. The exclusive appropriation of a part, the inconvenience arising from division, or from increased difficulty of access, and the cost of additional fencing, are alike the direct and immediate result of the construction of the road."

Yet, the present cause was so tried as to exclude from the jury all consideration of the effect of the road on the *whole tract*, and to confine it to the twenty feet actually occupied.

This can not be right. An owner has good cause to complain that such an assessment of his damages is inadequate.

They are not, indeed, to be assessed upon mere speculative theories, but such injuries as the common law recognizes as fit subjects for compensation may be proved. And, as was said in the above cited case, "when damages are assessed, after the completion of a railroad, it is possible to prove, with some reliable certainty, the difference in the market value of the land through which it passes, caused by the construction. Then the value at the time of the entry on the land is known, and so is its value, as affected by the improvement."

It can not be doubted that an entry on a man's land, without his consent, and doing anything there that impairs its value, is actionable, and a fit subject for damages at common law. The entry is legalized in instances like the present, but the damages are to be ascertained as if it had not been, and no fairer test can be applied than to compare the present value of the whole tract with its value before the entry and improvement were made.

To enable the jury to do this, they are entitled to the benefit of the opinions of witnesses of skill and judgment, who have had opportunities to learn the value of the property in question, or of similar properties in the same neighborhood. The value of the real estate which has not been offered in market is often a very difficult question. It belongs to that class of facts which exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. Pedigree, character, prescription, custom, boundary and all those questions of skill and art to which experts are commonly called, are of this class. Now, when witnesses lay before a jury their opinions of the value of a particular piece of real estate, it is usual and proper to bring out the grounds of their opinions, that a jury may see how far they are sound and trustworthy. The grounds of the opinion, like the opinion itself, should generally be referred to the jury to judge of. They should have been in this case. The jury's estimate of the opinions of witnesses would necessarily be much affected by the grounds they rested on, and it was error to deprive the party of the full benefit of his testimony.

What were the "imaginary and contingent facts" that led the judge to the exclusion of witnesses' opinions? He tells us

that "they were the dangers and delays of crossing the plaintiffs' road." Two underground railroads crossing each other at grade, and both worked in the darkness of a coal mine, were sure, in the opinion of witnesses, to lead to disasters and loss of property, perhaps of life. They supposed that the road of the petitioners had virtually prevented Brown from building and safely working the road essential to the enjoyment of his own estate, and hence their estimate of his damages.

Now, says the learned judge, "If he had constructed his road across the plaintiffs' road, and found, after a full trial, that the two roads interfered with the working of each other, this would have been a fact susceptible of proof." Undoubtedly. But is an owner to wait for the damages to which he is entitled from a party entering into his land until he shall have done his best to repair his injuries, and then charge only the insurmountable residue against the stranger? The constitution which requires the damages to be paid or secured *before entry* was not conceived in that spirit. It treats the land owner as entitled to the quiet enjoyment of all his rights until he is compensated for giving them up. The supposition on which the witnesses went was not unreasonable, and considering that the damages were to be estimated before actual experience could be had of the working of distinct roads, we see no reason for excluding it.

The question may be difficult, but that is a reason why the facts and circumstances to which witnesses referred their opinions should have been freely investigated. Railroads crossing each other at grade are always dangerous, whether in the darkness of the coal mine, or in the light of upper day; but could not these roads, at a small increase of expense, be made to cross one above the other? Was it indispensable that they should cross at all? Would not one road-bed, twenty feet wide, admit rails enough to serve both mines? The act of assembly provides that if parties can not agree upon "the mode, manner or point of connection" of their respective roads, the same shall be determined by the viewers. Was there any attempt in this case to perform this duty?

These questions, and perhaps others, were fit subjects of investigation before a jury, whose general duty it was to deter-

mine if the defendant had been injured at all, and if at all, to what amount, by the railroad of the petitioners. And when I say injured, I mean whether the value of his fifty acres, through which the petitioners ran their road, had been impaired and diminished?

We have looked through the bills of exception, and so far as the matters offered related to the question of damages, we think they were all admissible except evidence of the title and position of other lands of the defendant. Evidence relative to other coal than that of the fifty acres would seem to be irrelevant.

From what we have said, it is apparent that the third and fourth points, on the part of the defendant, should have been substantially affirmed in the charge, and that no other errors are found in the charge.

The judgment is reversed and a venire facias de novo awarded.

LYON v. GORMLEY, Executor of Lewis.

(53 Pennsylvania State, 261. Supreme Court, 1866.)

Right of way. The Lateral Railway Act of May 5, 1832, is intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the land of another.

Fee not divested. The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood or mineral. The act fastens on his land a servitude, but does not disturb any right not essential to the servitude.

[1] **Materials exsected.** The petitioner does not acquire the ownership of materials he may displace or any more than the right of way and the right to use those materials in the construction of his way.

Trover for coal severed. Coal having been severed from the freehold in constructing a lateral railway, it became the property of the owner of the freehold, and trover lay against the owner of the railroad for selling it.

Measure of damages. The general principle is that damages in trover are to be assessed as of the time of conversion; in this case it was at the sale of the coal.

Forsyth v. *Wells*, 5 Wright, 291, overruled.

Error to the Court of Common Pleas of Allegheny County.

[1] *Evans* v. *Haefner*, 5 M. R. 344.

This was an action of trover, to October term, 1862, by William A. Lyon against Samuel Gormley, executor, etc., of A. Kirk Lewis, to recover the value of 36,000 bushels of coal, taken and sold by the decedent, but claimed by Lyon to be his property, under the following circumstances:

Lewis, the decedent, under the act of May 5, 1862, Purd. 846, had constructed an underground railroad on the land of Lyon. The viewers reported on the subject of damages, that they estimated and found "that the damages that will be sustained taking into consideration the advantages to be derived by the said William M. Lyon by the opening, constructing, completing and using the said underground railroad, with two tracks as aforesaid, will amount to the sum of $1,100"; which sum was paid to Lyon.

In opening the road, Lewis dug out and sold the coal, which is the subject of this suit. This occurred in 1859.

The plaintiff's points were—

1. The proprietor of an underground lateral railroad, constructed through the lands of other parties, has no right to appropriate to his own use, and sell coal or other valuable minerals of said parties, which he may displace in opening his road.

2. The defendant's testator did not acquire title to the coal of the plaintiff, lying within the lines of the proposed lateral railroad, in virtue of the proceedings for constructing his road.

3. The coal in controversy in this case, when mined by the defendant's testator, in the opening of his road, became the personal property of the plaintiff.

* * * * * * *

5. The plaintiff is entitled to recover the price which the defendant's testator received for the coal in question, and interest.

The defendant's points were—

1. When a party, by virtue of proceedings under the Lateral Railroad Act and its supplements, constructs a railroad underground, through the coal vein of another party, and pays all damages assessed by the viewers, he thereby acquires ownership of the coal necessarily mined by him, in making his entry through such coal vein.

2. If he does not acquire ownership of such coal an action of trover will not lie, by the original owner of the coal, against the party constructing such railroad, to recover the value of such coal.

3. If such action would lie, it would not survive against the executor of the party.

* * * * * * *

5. If the court are of opinion that the present action is properly brought, the proper measure of damages is the value of the coal in the hill, at the time when mined by the defendants.

The jury found "for the plaintiff under the instruction of the court, and subject to the opinion of the court, upon the questions of law raised by the several points propounded by counsel, and reserved by the court;

"And assess the plaintiff's damages at the sum of $171.70, in case the court shall be of opinion that the measure of damages is the value of the coal in place;

"And at the sum of $981.12, in case the court shall be of opinion that the measure of the damages is the value of the coal at the month of the pit."

The court (STOWE, A. J.) below entered judgment for the defendant *non obstante veredicto*, which was assigned for error.

HAMILTON & ACHESON, for plaintiff in error; as to the ownership of the coal, cited Act of May 5, 1832, § 1, Purd. 846, pl. 49, Pamph. L. 501, § 5, p. 847, pl. 54; *Chambers* v. *Furry*, 1 Yeates, 167; *Lewis* v. *Jones*, 1 Barr, 336; Angell on Highways, § 302, *et seq.; Jackson* v. *Hathaway*, 15 Johns. 447. As to the form of action: *Forsyth* v. *Wells*, 5 Wright, 291; 1 Ch. Pl. 146, 147–48; *Martin* v. *Porter*, 5 M. & W. 351; *Higgon* v. *Mortimer*, 6 Car. & P. 616; *Backenstoss* v. *Stahler*, 9 Casey, 251; *Sanderson* v. *Haverstick*, 8 Barr, 294; *Kier* v. *Peterson*, 5 Wright, 359; Act of February 24, 1834, § 28, Purd. 286, pl. 90, Pamph. L. 77. As to the measure of damages: *Martin* v. *Porter*, 5 M. & W. 351; *Wild* v. *Holt*, 9 Id. 671; *Salmon* v. *Horwitz*, 28 E. L. & Eq. 175.

BURGWIN, for defendant in error.

The opinion of the court was delivered, January 7, 1867, by STRONG, J.

Our opinion is, that the Lateral Railway Act of May 5 1832, was intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the lands of another. The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood or minerals. The act fastens upon his land a servitude; but it does not disturb any right or ownership not essential to that servitude. Under the general railroad law, and in most of our railroad charters, provision is made only for the acquisition of a right of way, as also in the acts of assembly respecting ordinary highways. The proprietor of the land retains his exclusive right to all its mines, quarries, springs of water, timber and earth for every purpose not incompatible with the right of way. This is the almost universal rule, where a sovereign imposes a public right of way upon the land of an individual: *Jackson* v. *Hathaway*, 15 Johns. 447; *Sanderson* v. *Haverstick*, 8 Barr, 294. And there is nothing in the lateral railway acts that applies a different rule. The provision made for the assessment of damages shows that it is not contemplated that the petitioner shall acquire the ownership of the materials which he may excavate, or anything more than a right of way, and a right to use those materials in the construction of his way so far as they may be needed. The viewers are required to report "what damages will be sustained by the owner or owners of the land," through which it is proposed to build the road, "by the opening, constructing, completing and using the said railroad"; and it is made their duty "to take into consideration the advantages which may be derived" (*i. e.*, from the construction, opening, completion and use of the road) "by the owner or owners of the land." This report is always to be made before the construction of the railway can be commenced. In an underground railway, such as was constructed in this case, it is impossible for the viewers to know what may be excavated, and if what is taken out belongs to the petitioner for the road, it is impossible to estimate the damages of the owner of the land. An underground railroad may pass through an iron-ore bed, or a coal mine, or even a gold mine. Moreover, it is not necessary to his right of way, that the petitioner should become the owner of the minerals

or stone he may find it necessary to excavate, and it is not to be supposed the legislature intended to interfere with the rights of property of the land owner, any further than was needful to accomplish the object they had in view. There are also provisions of the act of 1832, other than those which relate to the assessment of damages, tending to show that the petitioner for the road acquires no ownership of the timber, earth, stone or minerals which he may displace.

The 3d section expressly enacts to what his ownership shall extend. It declares that the right of property in *the said railroad* shall be vested in him; not the right of property in all minerals he may find in the designated route of his road and rightly sever from connection with the freehold. So it may be inferred from the requisition of the 6th section, that a statement and account of the expenses incurred in the formation and completion of the road, shall be filed in the court of common pleas within three months after it shall be completed and put in use, to the end that the Commonwealth may take it on paying the money expended; that it was not contemplated the expense might be defrayed by a sale of anything taken from the land.

Besides these considerations, the 5th section, it may be remarked, is very significant. It enacts that he or they who shall construct the railroad, after having paid the damages ascertained in the mode provided, shall be entitled to use and apply all the gravel, timber and other materials on the route adopted, and within the breadth of twenty feet, to and for the completion of the road and bridges. Why this provision, if the petitioner becomes the owner of the material taken out by him? Yet even this does not recognize in him any absolute ownership. It simply authorizes a particular use. Can it be that while he has but a partial right to that portion of the material which he may use for the construction of the road, he has absolute ownership of that which he does not thus use? Before this can be held, a warrant for it should be found in clear legislative language. We think, therefore, the court below erred in ruling that, by the assessment and payment of damages, the ownership of the coal taken out by the defendant's testator on the line of the railroad, and not used in the completion of the road, became vested in him.

We think also, that an action of trover was properly brought. The coal had been lawfully severed from the freehold. It thus became personal property, and immediately on its severance the right of property and of possession was in the plaintiff. The subsequent sale by the defendant's testator was a conversion, and in that consisted the wrong.

The only remaining question is, what is the true measure of damages? In regard to this there would be no doubt were it not for *Forsyth* v. *Wells*, 5 Wright, 291. The general principle undoubtedly is, that the damages are to be assessed as of the time of conversion. In this case the conversion was at the time of the sale of the coal. In *Forsyth* v. *Wells*, it appeared that the defendant, who had a coal drift and mine upon his own land, had by mistake worked over upon the land of the plaintiff, and had taken out therefrom coal which he had converted to his own use. Two questions were raised, one of which was whether trover would lie, and the other was, what was the measure of damages. It was held by this court, that the true measure of damages was the fair value of the coal in place, with other such damage to the land as the mining may have caused. The decision was made by a bare majority of the court, and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. Then the coal had been taken under a mistake of right, and the act complained of was substantially a trespass. It was a case for compensation, and though it was held trover would lie, the action was treated as an action of trespass *quare clausum fregit* for an injury, not wanton. Thus the damage to the land caused by mining was reckoned as a constituent, in addition to the value of the coal in place. In fact, it was impossible to distinguish the conversion of the coal from the trespass upon the land; but in the case now before us the facts are widely different. The excavation of the coal and its removal from the land of the plaintiff were not acts of trespass. They were authorized by law. There is, therefore no connection between the wrong done by the defendant and the severance of the coal from the freehold. Even in actions of trespass, it has been held that the plaintiff is entitled to recover the value of coals taken from his land, at the time when they first existed as chattels, and that

the defendant is not entitled to a deduction for the expense of getting them: *Martin* v. *Porter*, 5 M. & W. 351; *Wild* v. *Holt*, 9 Id. 672; see also *Morgan* v. *Powell*, 3 Ad. & E., N. S. 278. These are cases where the excavation and the carrying away were one continuous act. Much more is the plaintiff in this case entitled to recover the value of the coal, as a chattel estimated as of the time of conversion.

Judgment reversed, and judgment for the plaintiff for $981.12, with interest from January 16, 1866.

WEST VIRGINIA TRANSPORTATION CO. v. THE VOLCANIC OIL AND COAL CO.

(5 West Virginia, 382. Supreme Court of Appeals, 1872.)

Pipe line. A pipe line for the transportation of petroleum with rates of toll fixed by its act of incorporation is a "highway" and an "internal improvement," and as such entitled to exercise the right of eminent domain.

[1] **Preliminary attempt to agree.** An offer and refusal at the local office of a corporation when its president and directors reside out of the State is a sufficient attempt to "agree" under the statute. The condemning company was not bound to go out of the State to make the offer.

This was a notice of a motion filed and docketed in the Circuit Court of Wood county, on the 15th of December, 1868. The notice filed by the Transportation Company to the Oil and Coal Company, was that the former would require the right of way on and sixty feet square of grounds belonging to the latter, for a pumping station; and that having been unable to agree with the Oil and Coal Company on terms of purchase of right of way on its lands, and also the fee simple of the sixty feet square, the former company would apply to the Circuit Court of Wood county for the appointment of five disinterested freeholders for the purpose of ascertaining a just compensation for the right of way and the sixty feet square in fee simple, according to the sixth section of chapter 56 of the Code of Virginia, 1860, and the charters of the Transportation Company. On the 24th of December, 1868, the circuit court denied the motion and gave defendant costs.

[1] *Mahoney* v. *San Francisco*, 53 Cal. 383

The facts were certified as duly proven in a bill of exceptions taken by plaintiff as follows:

"*First.* That said plaintiff is a corporation organized and incorporated under and by virtue of two several acts of the legislature of the State of West Virginia, one thereof entitled 'An act to incorporate the West Virginia Transportation Company,' passed February 26, 1867 (see chapter 95 of the acts of 1867), and the other thereof entitled 'An act to amend the charter of the West Virginia Transportation Company,' passed February 26, 1868. (See chapter 67 of the acts of 1868.)

"*Second.* That the capital stock of said plaintiff has been subscribed and two thirds of the same paid in as required by the third section of the act of 26th February, 1868, last mentioned.

"*Third.* That the defendant is a corporation formed under the act of the legislature of the State of West Virginia, passed October 26, 1863, entitled 'An act providing for the formation of corporations and regulating the same' (see chapter 83 of the acts of 1863); that said defendant is the owner of lands in fee simple in Wood county, State of West Virginia, as described in the map and specifications annexed to the notice upon which this motion is founded, and that the principal office or place of business of said defendant is upon the lands thereof at Volcano, Wood county, aforesaid. (For certificate of incorporation of said defendant, dated November 30, 1864, offered in evidence on the trial of this motion, see act of the legislature of the State of West Virginia for the year 1865, page 113.)

"*Fourth.* That the plaintiff, at a meeting of its president and board of directors, held on the 24th day of June, 1868, duly passed and enacted a resolution, authorizing one James McArthur to enter upon lands, examine same, and survey and lay out such as might seem to him fit for the purposes of the plaintiff, pursuant to the fourth section of chapter 56 of the Code of Virginia, edition of 1860; and in pursuance of said resolution said James McArthur did enter upon the lands aforesaid of defendant, examine same, make surveys thereof, and lay out a proposed line for a pipe or tubing thereon and branch pipes, for the purpose of transporting petroleum or other oils and fix the location for a pumping station thereon, as indicated upon the map annexed to the notice aforesaid.

"*Fifth.* That the plaintiff, at a meeting of its president and board of directors, held September 18, 1868, duly passed and enacted a resolution authorizing said James McArthur to offer and tender unto said defendant the sum of fifty dollars for the right of way over its lands by said plaintiff, for the purpose of laying a pipe or pipes thereon, as provided by the charter of said plaintiff.

"*Sixth.* That the plaintiff, at a meeting of its president and board of directors, held on the 23d day of November, 1868, duly passed and enacted a resolution authorizing one Philip L. Wilson to offer and tender to the said defendant the sum of one hundred dollars for the right of way over its lands and the fee simple of sixty feet square thereof, for the purpose of laying a pipe or pipes thereon, and building a pumping station thereon, as provided by the charter of said plaintiff.

"*Seventh.* That on the 26th day of September, 1868, one William C. Stiles, Jr., was the president of said defendant, and that both he and the parties composing the board of directors of said defendant, resided in the city of Philadelphia, State of Pennsylvania, and that at the time aforesaid, one William R. Sterling was the general agent and superintendent of said defendant and a stockholder therein, residing in Wood county, West Virginia; and that said Stiles and Sterling continued to be such president and agent, respectively, until October 1, 1868, and that said Sterling, as such agent, had no authority to make a deed or conveyance to said plaintiff of the right of way required pursuant to the resolution of said plaintiff aforesaid, passed September 18, 1868.

"*Eighth.* That on the 1st day of October, 1868, said William C. Stiles, Jr., ceased to be the president of said defendant, and one R. H. Gratz became the president thereof and ever since has been said president; that both said Gratz and the board of directors of said defendant elected with him, then resided and ever since have resided in the city of Philadelphia aforesaid, and that on said 1st day of October, 1868, said William R. Sterling ceased to be the general agent and superintendent of said defendant, and said William C. Stiles, Jr., was appointed in his place and stead, and removed to this State for that purpose, and ever since has continued to be said general agent and superintendent of defendant, and

that said Stiles, as such agent, had no authority to make such a deed to the plaintiff of the right of way and fee simple required pursuant to the resolutions of the plaintiff aforesaid, passed September 18, 1868, and November 23, 1868, respectively, and that at no time since the passage of the resolutions aforesaid has the defendant had any agent in the State of West Virginia, authorized to make or execute such deed or transfer, and that all official and solemn acts of said defendant emanate from the board of directors thereof, who hold their meetings in the city of Philadelphia aforesaid.

"*Ninth.* That the right of way through and over, and fee simple in sixty feet square of the lands aforesaid of said defendant, were required by said plaintiff for the purposes and objects indicated in its two several charters aforesaid.

"*Tenth.* That on the 26th day of September, 1868, the said James McArthur, by virtue of the resolutions aforesaid, passed by said plaintiff on the 18th of September, 1868, at the principal office or place of business of said defendant at Volcano, Wood county, aforesaid, tendered to one E. W. Staples, a clerk in and in charge of said office, the sum of fifty dollars in legal tender for said right of way; said sum was refused. At the time of the said tender the president of said defendant was in Philadelphia aforesaid, and said William R. Sterling, agent as aforesaid, was absent from said office, and out of this State; that upon the return of said Sterling a day or two afterward, he communicated said tender to the board of directors of said defendant, and the said defendant has never accepted the same.

"*Eleventh.* That on the 24th day of November, 1868, the said Philip L. Wilson, by virtue of the resolution aforesaid, passed by said plaintiff, November 23, 1868, at Parkersburg, Wood county, aforesaid, tendered to William C. Stiles, Jr., then general agent as aforesaid of said defendant, the sum of three hundred dollars in legal tender for the right of way, and sixty feet square in fee simple of the lands aforesaid, described in the notice, map, and specification aforesaid; which said sum was then and there refused, and said defendant has not since, by said Stiles, or otherwise, accepted the same.

"*Twelfth.* That the pipe or line of tubing proposed to be laid by said plaintiff is of two inches in internal diameter, and

that in order to lay the same, a trench about eighteen inches deep and about one foot wide is dug and the pipe laid in, then the trench filled up and not again disturbed unless for repairs, which are but seldom required after the pipe is once in working order. No timber or building would be disturbed by the laying of said pipe. The lands aforesaid of said defendant are what are commonly known as wild lands, and for several years past have been oil producing. To lands of the latter character, a pipe or line of tubing is beneficial, because it increases the means of transporting the oil produced.

"*Thirteenth.* That as a usual thing the plaintiff has procured right of way over lands in the vicinity of defendant for the purpose aforesaid, at prices ranging from five to twenty dollars, and in many cases has received the same for nothing, owing to the advantages and benefits afforded by said pipe or tubing.

"*Fourteenth.* That upon the trial of said motion, said plaintiff claimed and produced testimony to prove that the offer of three hundred dollars, made as aforesaid, would be a just and reasonable compensation for the same, and therefore it was proven that a fair compensation would be from three hundred to one thousand dollars.

"*Fifteenth.* That on the 29th day of October, 1868, said James McArthur exhibited to said William C. Stiles, Jr., a map like the one annexed to the notice aforesaid, and explained to him what said plaintiff desired, the line and course said pipe would take, and the distance (some four or five miles) it would pass over said defendant's land. And that both said Sterling and Stiles were acquainted with the general nature and requirements of a line of pipe or tubing for transporting oil, and that said Sterling is part owner of a pipe for said purposes, now in operation at Volcano, Wood county, aforesaid."

The plaintiff brought the case here for review.

SANDS, for the plaintiff in error.

HUTCHINSON, for defendant in error.

MOORE, J.

It has been decided time and time again, and is therefore

settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., creating the necessary facilities for inter-communication, constitutes what is generally known by the name of *internal improvements*, and gives occasion for the exercise of the right of eminent domain. It has been held that railways are but improved highways, and are of such public use as to justify the exercise of eminent domain: Redfield on Railways, title Eminent Domain, § 2 and notes. Judge Cooley, in his masterly work, "Constitutional Limitations," second edition, side page 533, upon authorities cited, thus forcibly writes: "Every government is expected to make provision for the public ways, and for this purpose it may seize and appropriate lands. And as the wants of traffic and travel require facilities beyond those afforded by the common highway, over which any one may pass with his own vehicles, the government may establish the higher grade of highways, upon some of which only its own vehicles can be allowed to run, while others, differently constructed, shall be open to use by all on payment of toll. The common highway is kept in repair by assessments of labor and money; the tolls paid upon turnpikes or the fares on railways, are the equivalents to these assessments; and when these improvements are required by law to be kept open for use by the public impartially, they also may properly be called highways, and the use to which land for their construction is put, be denominated a public use. The government also provides court houses for the administration of justice, buildings for its seminaries of instruction, aqueducts to convey pure and wholesome water into large towns; it builds levees to prevent the country being overflowed by the rising streams; it may cause drains to be constructed to relieve swamps and marshes of their stagnant water, and other measures of general utility in which the public at large are interested, and which require the appropriation of private property, are also within the powers where they fall within the reasons underlying the cases mentioned."

The charter granted to "The West Virginia Transportation Company," by especial enactment of the legislature, shows that the object was "to construct and maintain a line or lines of tubing, for the purpose of transporting petroleum or other

oils through pipes of iron or other materials, in the counties of Wirt, Wood, Ritchie and Pleasants, in the State of West Virginia, to any railroad or other roads, or to any navigable stream or streams, in or adjoining the counties aforesaid, and to transport from the termini of said pipe or pipes, petroleum or other oils in tank cars, boats or other receptacles belonging to said company," etc.

The charter also established the maximum charges the company should make for transportation of oils. I can not see the propriety of admitting a railway or canal or aqueduct to be an "internal improvement," and declare this tube highway for transportation not to be. It is an "internal improvement," within contemplation of the constitution, Art. 11. § 5, which gave the legislature power to create the company by special acts.

The charter also empowers the company "to enter and condemn lands, and to acquire rights of way, in the counties aforesaid, for the purposes of said company, in the manner provided in the fifty-sixth chapter of the Code of Virginia, second edition; and in such cases where it may be deemed advisable by said company, shall, at its option, have the power to acquire a sufficient right of way only for the purpose of its said improvement over any such lands, instead of the fee simple thereof."

That the legislature had the power to confer on the company the right to enter and condemn lands, is not an open question. Private property can only be taken for public uses pursuant to law; it must be authorized by legislative enactment, and a strict compliance must be had with all the provisions of the law before a party can be deprived of his property.

In this case the company has proceeded to condemn the land in the manner provided in the fifty-sixth chapter of the Code of 1860, as directed by its charter. By the sixth section of said chapter it is declared: "If the president and directors of a company incorporated for a work of internal improvement," "can not agree on terms of purchase with those entitled to lands wanted for the purposes of the company," "five disinterested freeholders shall be appointed by the court of the county or corporation in which such land or the greater part

thereof shall lie (any three of whom may act), for the purpose of ascertaining a just compensation for such land." (Since the county court was abolished the circuit court has jurisdiction in such applications.) The company has proceeded regularly under the statute, but the appellee insists that the company had no right to proceed to the appointment of commissioners, as it did not appear that the appellant and appellee could not agree on terms of purchase of the lands by the appellant. It appears that the appellee is a corporation organized under the general corporation laws of the State, passed in 1863, having its principal office or place of business in Wood county, but its president and board of directors resided without the State. The appellant, by resolutions, determined on sums extending to three hundred dollars as the amount it was willing to give for the land, and appointed agents to make the offers to the appellee; the agents did make the offers through the agent of the appellee, at its principal office of business in this State; the money was then and there refused.

It seems to me the attempt to agree was sufficiently made, and that it was not incumbent on the appellant to have made further effort, as it was not necessary to go to the president and directors out of the State for that purpose, when there was an agent at the office of business in the State. The facts as stated in the bills of exception certainly indicate that the appellant made an honest effort to bring about an agreement on the amount of compensation; not less than two propositions were made by it; ample time was allowed for acceptance or refusal; the appellee did not accept; the non-acceptance and silence was equivalent to a refusal of the proposition, and the appellant properly proceeded to condemn; and the circuit court should have appointed the commissioners for that purpose, and has erred in not doing so.

The proceedings, having been commenced before the 1st day of April, 1869, are not affected by the repealing act of the new code, and the proceedings hereafter may be either under the terms of the charter, which is not repealed, or conform as far as practicable to the provisions of chapter 42 of the Code of West Virginia.

The judgment must be reversed, with costs against the appellee, and the case remanded to the Circuit Court of Wood county to be proceeded with.

The other judges concurred.

Judgment reversed.

VALLEY CITY SALT CO. v. BROWN ET AL.

(7 West Virginia, 191. Supreme Court of Appeals, 1874.)

Underground railroad not of public utility. A company owning coal lands petitioned for the condemnation of an underground right of way (tunnel) from their coal lands. The commissioners' report and the evidence showed that the company owned about thirty acres of coal which could not be mined and transported without going through the land sought to be condemned; that the company used the coal for manufacturing salt and also to sell; but that it was not the only supply of those who bought from them and that the underground railroad would not be used by the public: *Held*, no case of "public utility" within the meaning of the Statute of Eminent Domain.

Essentials of a case for the exercise of eminent domain. There should be: (1) a clear public use: (2) a controlling power retained by the government over the condemning party, and, (3) extreme difficulty in effectuating the purpose in any other way. The combination of these three elements is perhaps as close an approximation as can be made, to a rule or test in such cases.

This was an appeal from the judgment of the Circuit Court of Mason county, rendered on the 28th day of May, 1872, in a certain suit therein pending, wherein the Valley City Salt Company was plaintiff, and Major Brown, Isaac Green and Mahala, his wife, Joseph Hereford and Susannah, his wife, Lydia Pumphrey, Virginia Pumphrey, Ella Pumphrey, Alice C. Pumphrey ——— Ross, and Cassandia, his wife, Bazelel J. Pumphrey and Ann, his wife, George W. Pumphrey, in his own right, and as executor of Nimrod Pumphrey, and as trustee of Adaline Agnew, and Jane, wife of said George W. Pumphrey, Perry C. Parnell, and Mary Ellen, his wife, Daniel Polsley, as executor of Nimrod Pumphrey, and as trustee of Adaline Agnew, and Adaline Agnew, were defendants. The appeal was taken by Major Brown, one of the defendants.

The Hon. JAMES W. HOGE, judge of the circuit of said county, presided at the trial below.

The facts in the case, together with the constitutional provisions referred to, are sufficiently set forth in the opinion of PAULL, Judge.

EDWARD B. KNIGHT, and WILLIAM H. TOMLINSON, for the appellant.

J. W. ENGLISH, for the appellee.

PAULL, Judge.

[1]The Valley City Salt Company, the appellee and plaintiff below in this proceeding, is a corporation organized under the laws of this State, for the purpose of digging or boring for salt and other minerals, and manufacturing the same, and also for mining coal and marketing the same, and for selling

[1]The following are the sections referred to in the opinion: "44. Any person owning land having timber upon it or containing coal, ore, or other minerals, who desires to obtain a subterranean or surface right of way, by railroad or otherwise, under, through, or over land belonging to another, or over any railroad, canal, State or county road, for the purpose of mining for such minerals, or conveying such timber or minerals to market, or for the purpose of draining any coal or mineral lands under, through or over lands belonging to another, or who desires to obtain land on or near a railroad or navigable stream or public road, for a place of deposit, sale and shipment of such timber or minerals, may make application therefor, pursuant to the forty-second chapter, to the circuit court of the county, and the proceedings thereon had shall conform to the said chapter.

"45. The report of the commissioners appointed pursuant to the said forty-second chapter, to ascertain the just compensation to be paid for the property to be taken or injured for the purpose mentioned in the preceding section, shall not be confirmed and ordered to be recorded by the court, unless from such report and the evidence in the case the court is of the opinion that the purpose for which the property is to be taken is of public utility, nor then, if it appear that the mansion house of any person, or the yard, garden or orchard pertaining thereto, or any mill, warehouse, factory, store or shop, railroad, canal, State or county road will be materially injured; and upon payment of the compensation so ascertained, within the time and the manner prescribed by the eighteenth section of the said chapter, a right of way only shall be vested in the applicant, not to exceed fifty feet wide in any case, except as to the land condemned for such place of deposit, sale and shipment (which shall in no case exceed one acre), as to which the title shall be absolutely vested in the applicant upon such payment. When the right is so vested in the applicant to cross any railroad, canal, State, county or other road, he shall at his own expense make and arrange the said crossing so as not to interrupt, or in any wise interfere with, the free use of such railroad, canal, State, county or other road."

goods, having its principal office or place of business at Hartford City, in Mason county, West Virginia.

The said company being the owner of a certain tract of land, containing thirty acres, and desiring to obtain access thereto by subterranean right of way, by railroad, under a portion of an intervening tract, sought the benefit of the forty-fourth and forty-fifth sections of chapter forty-three of the Code of West Virginia. A petition was addressed to the Circuit Court of Mason county, setting forth the fact of ownership, and asking that commissioners might be appointed to ascertain what would be a just compensation to the owners of the land for what was sought to be taken in accordance with the provisions of law. The petition recites that the said right of way was "sought to be established by said company, in order that it may mine and remove the coal from said tract of land, marked D, for the purpose of marketing the same, and of supplying the salt furnace of said company with coal, and for draining the rooms and entries which may be made in said lot D." To this petition Major Brown demurred; commissioners were appointed, and made their report, to which the defendant, Brown, filed exceptions; but the same were overruled by the court, and the report directed to be recorded on the chancery side of the court, the judge being satisfied that the purpose for which the property in the petition mentioned is to be taken is of public utility, and it not appearing that the mansion house of any person, or the yard, garden or orchard pertaining thereto, or any mill, warehouse, factory, store, or shop, railroad, canal, State or county road will be materially injured by the taking of said property for said subterranean right of way.

Two of the exceptions (the first and fifth) made to the report present the chief question raised by these proceedings for the consideration of the court, to wit: Whether the applicants, the appellees here, are justified in invoking the right of eminent domain, residing in the State, for the accomplishment of their object. And to this question our attention will now be directed. The former constitution of this State, under which this cause originated, provided, as probably do the constitutions of all the States of this Union, in article two, section six, that "private property shall not be taken for public use without just compensation." And that

"no person, in time of peace, shall be deprived of life, liberty or property without due process of law." These provisions have been invoked by the defendant for his protection or the protection of his property. We observe in the outset that private property is there held subject to "public use," according to this provision of our civil compact, wherever the legislature of the State, in the exercise of its wisdom, shall see proper to wield the high and sovereign power of the government for this purpose. We observe, in the second place, that this constitutional limitation impliedly prohibits the taking of private property for any private use whatever, without the consent of the owner. This last proposition has been long supported in the legislative and judicial history of the country by the weight of authorities; but this question does not arise in the present case, and is not intended to be decided at this time.

The remaining and material question then is, whether the land which has been taken by the proceedings in the present case is taken for *public use*, as that use is found to appear in accordance with established legal principles. If so, the proceedings (if there be no formal objection to them) are valid, and if such use is not found to appear, they are void. We remark here, that the words "public utility," occurring in the forty-fifth section, must be regarded as synonymous with the words "public use." We do not suppose that any different meaning was intended by the legislature, but if there was, and there is really any difference in the signification, that attached to the language in the higher law must prevail.

What, then, constitutes a public use, as contradistinguished from private use? The most extended research will not likely result in the discovery of any rule, or set of rules or principles, of certain and universal application, by which this question can be determined in all cases. Eminent jurists and distinguished writers upon public law do not express concurrent or uniform views upon this subject. It is a question, from its very nature, of great practical, perhaps of insuperable difficulty, to determine the degree of necessity, or the extent of public use, which justifies the exercise of this extraordinary power upon the part of a State, by which the citizen, without his will, is deprived of his property. For example, says Chancellor WALWORTH, in the case of *Beekman* v. *Sara-*

toga and Schenectady Railroad Company, in speaking of the *public interest:* "But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals, for that purpose." An eminent commentator, Judge Cooley, referring to this language, says: "It would not be entirely safe, however, to apply with much liberality the language above quoted, that 'when the public interest can be in any way promoted by the taking of private property,' the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would likely be better employed or occupied, to the advancement of the public interest, in other hands than in their own: but it does not follow, from this circumstance alone, that they may rightfully be dispossessed." And then follow some forcible and pertinent illustrations. Chief Justice BIGELOW, in [1] *Talbot* v. *Hudson*, 24 Monthly Law Reporter, says: "If land be taken for a fort, canal, or highway, it would clearly fall within the first class (public use). If it was transferred from one person to another, or to several persons, for their own peculiar benefit or advantage, it would clearly come within the second class (private use). There is no fixed rule, or standard, by which such cases can be tried and determined. Each must depend on its own peculiar circumstances." This, so far as our investigation has gone, is literally true—public writers, and the reported cases of numbers of the States, furnishing us with no one certain and absolute standard of judgment. Says Justice MCCURDY, in delivering the opinion of the Supreme Court of Connecticut, "One of the most common meanings of the word 'use,' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' Public use may, therefore, well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the State, under its right of eminent domain, for pur-

[1] 16 Gray, 417.

poses of great advantage to the community, is a taking for public use." While this is in one sense true, it is yet perfectly obvious that if the principle there announced is acted upon, without a most careful and guarded reference to the nature, necessity and extent of the use for which private property is sought to be taken, the great constitutional safeguard which has been thrown around it will be utterly subverted.

It may now be further observed that it is not the nature of the agents or agencies which the State may employ for accomplishing a public use that determines, in any degree, its exercise of the right of eminent domain. These may be either natural persons, or public or private corporations, organized for their own exclusive profit and emolument, *provided* there is connected with them a *public use* of such necessity or extent as will properly justify the interference of the State's sovereign power on their behalf. A railroad company, as well as any other, illustrates this truth, being simply a private corporation, seeking the pecuniary benefit of its stockholders, while, nevertheless, vastly promoting the public interests in the facilities afforded to the public for travel and transportation. Indeed, the tendencies of our present organized form of society, is to accomplish benefits and secure the public good, as far as practicable, through the means of private enterprise, activity and thrift; and this is seen in the provisions of our code, now under consideration. The uniform history of the States, as connected with the exercise of this attribute of sovereignty, shows that it can not be limited as to the agencies employed, either as to their nature, or the private purposes for which they are called into being. These agencies, whether corporate or otherwise, must have two-fold interests, both private and public; while the former alone may be regarded, so far as the agency or corporation itself is concerned, yet when it is sought to clothe it with the right of eminent domain, the latter only can be regarded; here a direct purpose to benefit the public must be made to appear, and this in some direct and satisfactory form. It is manifest that not all agencies or corporations, though having a general tendency to promote the public interests, can invoke the exercise of this power of the State. For example, as long as the public must and will travel, hotels for its accommodation are useful, indeed, essential and indispensable; so,

also, printing or publishing companies, stage lines and other forms of industry are essential to the public good, but it will not be claimed that they are entitled, merely on that account, to the aid of the State, in the manner indicated. Again, it has been most strenuously argued that the term *public use* must be confined to its simple sense of *direct* possession, occupation and enjoyment by the public; but this principle, again, if inflexibly enforced would, in many instances, probably defeat the most salutary exercise of the power.

In looking at the history of the States upon this subject, we find that the following objects embrace about all, perhaps every one, in whose behalf the States have interposed their sovereign power, to wit: public highways, turnpike roads, canals and railroads; also for the purpose of erecting wharves, basins, streets and alleys; of establishing ferries, draining swamps and marshes; of bringing water to cities and villages; of erecting dams for the improvement of navigable streams, and the creation and protection of flouring mills. The legislation of other States has embraced these objects, and we think these only, so far as we have seen, down to the present time. While this course of legislation does not furnish an absolute law of exclusion at all, it does indicate that the enlightened judgment and wisdom of our legislative bodies has found no other objects of sufficient importance or necessity to justify the exercise of this high power on the part of the States. In this connection we refer to an observation made by Judge Cooley in his work on Con. Lim., 532: "The reason of the case, and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such, where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the government to provide."

In looking at the class of objects above enumerated, we find that they are all of an undoubted needful character; in other words there is connected with them all, a clear *public use;* this element is indispensable: again, we find that in re-

gard to them all, the government still maintains its power and can so regulate and control the action of the agencies by which they are managed as to secure the rights and interests of the public therein; and if to these we shall add the impossibility, or extreme difficulty at least, of effectuating the same purposes in any other way, we may, perhaps, find in the combination of these three elements a rule particularly safe for our guidance in determining in any particular case whether there has been a constitutional exercise of the right of eminent domain.

Before applying this rule to the case in hand we refer again to said forty-fourth and forty-fifth sections of our code; it will be observed that the right given in the forty-fourth section to certain parties to call in the aid of the State is not absolute, but modified and controlled by the forty-fifth section, making it the express duty of the court to determine whether the purpose, in any particular application which is made, for which the property is to be taken, is of public utility or use; if not all the proceedings must be rejected. It is not necessary, therefore, to pass here upon the constitutional character of the forty-fourth section, but simply to determine whether, under all the circumstances of this case, as seen in the report and evidence, a public use is legally found to appear; this it is made the express duty of the courts to determine in each case as it may arise.

In looking at the proceedings in this case we find no light or information upon this point in the report of the commissioners; the evidence introduces the certificate of incorporation, which recites the purposes of its organization, which have been hereinbefore set forth, to wit: of digging and boring for salt and other minerals and making the same; and also for mining coal and marketing the same; and also for selling goods. The evidence further recites that the applicants were to sell their coal to the people living in and about the town of Hartford City, in Mason county, but at the same time, that said people could obtain their coal from other sources; that the public would not use the subterranean right of way, but the applicants only.

We are unable to see in this evidence and report of commissioners any of the requisitions of the rule; the work is not even needed to supply a limited neighborhood with coal;

they can otherwise obtain their supplies; it is not extremely difficult, much less impossible to do so, and there is no remaining supervision of law to regulate or secure any possible public interests. No sufficient public use is therefore made to appear to justify an interference with the rights of private property. To secure the possession and enjoyment of private property is one of the chief ends of all free governments, and hence the limitation found in our National and State Constitutions to secure this object and the safeguard thus provided in the supreme law may not be lightly or recklessly invaded. To destroy or materially weaken its force would be to subvert one of the pillars on which rests the fabric of our civil society. While cheerfully conceding that private interests must yield to the public exigencies or the public good in a proper case, yet that proper case must be clearly made to appear. Said a learned jurist, of Virginia, Judge Green, in 6 Randolph, "Liberty itself consists essentially, as well in the security of private property as of the persons of individuals, and this security of private property is one of the primary objects of civil government, which our ancestors in passing our constitution intended to secure to themselves and their posterity, effectually and forever."

An eminent statesman of England, referring to the security of the subject under the *Ægis* of English law, once said: "There stands the poor man's cottage; the rains of summer and the snows of winter may enter its crevices, but the King of England with all his forces, dare not enter that poor man's cottage."

In our own country the citizen should be equally safe in his person and property under the shield of our constitutions, and the acknowledged pre-eminent dominion of the State—never needlessly employed to interfere with the private rights of the highest or the lowest in the land.

The judgment or order of the Circuit Court of Mason county, made on the 28th day of May, 1872, confirming the report of the commissioners and ordering it to be recorded, is set aside and reversed with costs to the appellant, and this court proceeding to render such judgment as the court below ought to have rendered, doth adjudge and order that the petition of

the appellee be and the same is hereby dismissed with costs, in the circuit court, and that this order be certified to the Circuit Court of Mason county.

The other judges concurred.

Judgment reversed and proceeding dismissed.

EDGEWOOD RAILROAD COMPANY'S APPEAL.

(79 Pennsylvania State, 257. Supreme Court, 1875.)

Condemning way under pretense of public use. The owner of coal mines can not, for the benefit of the mines, organize a railroad corporation and condemn land under the general railroad laws, nor otherwise than by strict compliance with the lateral railroad laws. Such a railroad is not for public use within the meaning of the acts of April 4, 1868 and April 28, 1871.

Power, when exercised. The power of eminent domain is conferred on citizens only when some existing public need is to be supplied, or some present public advantage to be gained, but not with a view to contingent results, dependent upon the success of a projected speculation.

Injunction against building unchartered railroad. A railroad company organized for the benefit of coal mines, and not within any of the statutes authorizing the condemnation of lands for railroads connecting with coal mines, should be enjoined from constructing its road across private property.

Appeal from the Court of Common Pleas of Allegheny County. In equity.

The bill in this case was filed June 14, 1873, by the Western Pennsylvania Institution for the Instruction of the Deaf and Dumb against the Edgewood Railroad Company.

The bill set out: 1, 2, 3. That the plaintiffs, an incorporated company, owned ten acres of ground in Wilkins township, Allegheny county, near Edgewood station of the Pennsylvania railroad; that the property was acquired for the erection of suitable buildings for the institution for the deaf and dumb. 4. That Thomas C. Dickson, Charles H. Armstrong, William H. Shoenberger "and others," owning a large body of coal in the vicinity of Edgewood station, not being willing to procure means of transporting their coal to the Pennsylvania railroad under the lateral railroad laws, under

cover of constructing a railroad for public use, and the general transportation of persons and property over the same, had associated themselves as a corporation, by the name of The Edgewood Railroad Company, under the act of April 4, 1868. 5. The plaintiffs charged that it was not the intention of defendants to use their railroad for any other purpose than to transport their coal; that the road extended only to the property of the plaintiffs, and of James Kelly, a distance of not more than half a mile from its beginning at the Pennsylvania railroad, ending in hills inaccessible for railroad purposes, at a point uninhabited, running its entire length in close proximity to the Pennsylvania railroad, without any public demand or necessity for it, and was only a contrivance to secure for their private use the advantages granted by the Commonwealth for public purposes. 6. That defendants, without plaintiffs' consent, had taken possession of part of their ground, extending from the Pennsylvania railroad, and curving through plaintiffs' property, having a width of one hundred and fifty feet on the Pennsylvania railroad, and are grading the ground for a railroad, although there are other routes by which they could construct their road without going through plaintiffs' ground; that the route taken was amongst the most eligible for the erection of the plaintiffs' buildings; was the site designated for them, and if the defendants' railroad should be constructed it would greatly impair, if not destroy, the property for the uses to which it had been dedicated.

The prayer was for an injunction to restrain defendants from constructing their railroad, etc.

The defendants by their answer denied that the plaintiffs owned the ground through which defendants were constructing the road; they denied that they had acted from the motives charged in the fourth paragraph of the bill. 5. They denied all the allegations in the fifth paragraph of the bill. 6. They averred that the route selected by them for their road was the most eligible and calculated to do the least injury to private property. They averred that they were a corporation under the act of April 4, 1868, and its supplement of April 28, 1871, to build a railroad "from a point near to and west of Edgewood station, on the Pennsylvania railroad, to the

Hampton coal mines, near the eastern terminus of the village of Wilkinsburg; that prior to the final location of their road, they made an examination as to the ownership of the land and ascertained that the record title was in James Kelly; that they tried to agree with him for the damages without success, and on the 21st of June, 1873, they tendered to him a bond for the damages which he refused to accept; the bond was then presented to the court of common pleas and approved, and it was filed of record in that court.

The Act of April 4th, 1868, Pamph. L. 62, 2 Br. Purd. 1,211, enacts: Sect. 1. That any number of citizens of Pennsylvania, not less than nine, may form a company for constructing and operating "a railroad for public use in the conveyance of persons and property," and for that purpose may enter into articles of association. Sect. 2 further designates the form, etc., of the articles; it directs that they shall be filed in the office of the secretary of the Commonwealth, etc., "and thereupon the said articles of association shall become and be a charter for the said company," etc., and the persons subscribing the articles, and others becoming stockholders, shall be a corporation, etc.

Sect. 3. That a copy of the articles of association filed, etc., in pursuance of the act, certified by the secretary of the Commonwealth, "shall be evidence of the incorporation of such company and of the facts therein stated."

Sect. 5. Upon complying with the provisions of the act, the company have authority to carry into effect the objects named in it, as if they had been incorporated by a special act of the legislature, and may exercise all the privileges, etc., and be subject to all the restrictions of the General Railroad Law of February 19, 1849, and its several supplements.

Sect. 9. Authorizes the corporation to construct branches.

Sect. 12. Prohibits the corporation from making street passenger railways by virtue of this act.

The Act of April 28th, 1871, Pamph. L. 246, 2 Br. Purd. 1,213, enacts: Sect. 1. That three persons may become a company as provided by the act of 1868, to construct, etc., a railroad for public use, etc., which shall not be longer than five miles.

The Act of June 19th, 1871, Pamph. L. 1361, 1 Br. Purd.

288, pl. 39, enacts: Sect. 1. That in proceedings in courts of law and equity, in which it is alleged that the private rights of individuals or of corporations are injured or invaded by any corporation claiming a right or franchise to do the act from which such injury results, the court may "inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act, * * * and if such rights or franchises have not been conferred on such corporation, such courts, if exercising equitable powers shall, by injunction * * * restrain such injurious acts." * * *

On the 5th of January, 1871, James Kelly executed a writing, reciting that a number of citizens of Allegheny county, interested in the welfare of the deaf and dumb near Pittsburg, were desirous that an institution in that vicinity for their education should be incorporated, and Kelly, being desirous of promoting the object, proposed to give ten acres of land near Edgewood station, in Wilkins township; and in consideration of the premises, Kelly agreed to convey the land to James P. Sterrett and others in fee, in trust for the purposes above mentioned, to be conveyed to the corporation when a charter should be obtained, the conveyance not to be executed until $20,000 should be subscribed for the erection of suitable buildings.

The plaintiffs were incorporated April 12th, 1871, and prior to April, 1872, the sum of $20,000 was subscribed as stipulated in Kelly's agreement; on the 15th of December, 1873, Kelly conveyed the land to plaintiffs.

Under the act of 1868 and its supplement of 1871, W. H. Shoenberger, Charles H. Armstrong, John Z. Spier, Thomas C. Dickson, J. McC. Creighton, Francis Ardary, Charles L. Fitzhugh, G. A. Steiner, Thomas Blair and Robert Dickson, upon complying with the requirements of the acts, were, on the 24th of May, 1873, constituted a corporation by the name of the Edgewood Railroad Company, to continue for ninety-nine years, for the purposes set out in the bill and answer; the length of this railroad to be about one mile.

On the 31st of March, 1873, George R. Johnson leased to John Dickson, Robert Dickson, Thomas C. Dickson, John S. Stewart and Joseph C. Dickson, trading as Dickson, Stewart & Co., a piece of land in Wilkins township, "to be used

as or for a right of way for their coal railroad, and for no other purpose whatever except as herein provided," etc., "beginning at a point on land of James Kelly," and the northermost line of the right of way of said railroad and by various courses and distances "to the line of Kelly's land aforesaid," containing 9 7 10 acres, to hold, etc., as long as the lessees shall use it as a right of way in accordance with the terms of the lease, paying an annual rent of $1,000, etc.; it was further stipulated "that the piece or tract of land hereby leased for said right of way, shall not be used for any other than right of way purposes, and such purposes as are necessary for the ordinary working of coal works and coal railroad; but it is expressly agreed and understood that no buildings shall be erected upon the same except such as may be necessary for the purposes of coal railroad and works."

A replication was filed to the answer, and D. D. Bruce, Esq., was appointed examiner and master.

The master found that at the time of filing the bill the plaintiffs were the owners of the *locus in quo*.

He also found that the body of coal land mentioned in the fourth paragraph of the bill was purchased in April, 1872, by Dickson, Stewart & Co., who held the title for the "Hampton Coal Company," a private association, composed of Shoenberger & Co., Charles H. Armstrong and Dickson, Stewart & Co., each owning one third. W. H. Shoenberger, C. H. Armstrong, J. Z. Spier, C. L. Fitzhugh and T. S. Blair of the firm of Shoenberger & Co., were stockholders of the defendants; Thomas C. Dickson, Robert Dickson of the firm of Dickson, Stewart & Co., were stockholders of defendants; G. A. Steiner and C. H. Armstrong were also members of both companies; J. McC. Creighton and Francis Ardary, who were stockholders of defendants, had no interest in the Hampton Coal Company but could purchase an interest any time. The master thereupon found, that the persons named in the fourth paragraph of the bill as owners of the coal, and others, composed the corporation of Edgewood Railroad Company. In his report the master says:

The main questions involved in the case are:

1. Whether the defendants' road is a railroad for public use such as is contemplated under the act of April 4, 1868, and its supplement of April 28, 1871?

2. Had the defendants complied with their charter in building their railroad?

In considering these questions, the master found:

"The Edgewood railroad is situated on the Pennsylvania railroad, about seven miles east of the union depot, in the city of Pittsburg; its terminus *a quo* is on the east side of the Pennsylvania railroad, about midway between Wilkinsburg and Edgewood stations, and its terminus *ad quem* at the Hampton coal mines, near to the eastern terminus of the unincorporated village of Wilkinsburg. It is sixty feet in width, and forty-seven hundred feet in length between its termini. Its grade is from one foot to one foot and a half in the hundred feet, ascending from the Pennsylvania railroad to its eastern terminus at the coal mines. Its eastern terminus is in a ravine, known as Johnston's ravine, and the bed of the road at this terminus is about one hundred feet below the level of the stratum of coal of the Hampton Coal Company. The ravine is surrounded by the hills at both sides and at its eastern end." * * *

A portion of the ground covered by the Johnston lease "extends from Kelly's line east to the township road, a distance of 780 feet, is only 33⅓ feet wide, and is the exact ground on which the Edgewood railroad is now built. East of the said township road, and on the line of the road, the lease ground widens out to about 125 feet, and as it extends up the ravine it widens still more, its greatest width being from 250 to 275 feet, including within its limits the line of the Edgewood railroad, and also the incline railway of the Hampton Coal Company, and also extending on to the coal openings of that company. * * * The lease from Johnston, of the right of way, now belongs to the Hampton Coal Company.

"Immediately after the incorporation of the Edgewood Railroad Company, we find it adopting as the site of its road * * * the exact ground from Kelly's line into Johnston's ravine, as the same is described as the coal road in the lease of Johnston to Dickson, Stewart & Co., which then belonged to the Hampton Coal Company. Looking at these facts connected with the coal of the Hampton Coal Company, it is very evident that the Edgewood Railroad Company was projected

and originated by that coal company, and that the primary object and design in constructing the Edgewood railroad, was for the purpose of connecting the Hampton coal mines with the Pennsylvania railroad, so that the coal from those mines could reach a market. * * * If the facts in this case demonstrate that there is no public demand or necessity for the railroad of the defendant, and that it is not the intention to maintain and operate the same for public use in the conveyance of persons and property, then the road is a nuisance, and should be abated from plaintiff's property. * * *

"For what public use in the conveyance of persons and property will the defendants' railroad be maintained and operated?

"This railroad connects with the Pennsylvania railroad about midway between the Wilkinsburg and Edgewood stations; then extending eastwardly it passes over the *locus* of this controversy, a distance of about 700 feet; then over land of James Kelly, until it comes to the line of the lease of right of way of the Hampton Coal Company, a further distance of about 200 feet; then over the right of way and crossing the township road, a distance of about 2,000 feet to the eastern terminus, having an entire length of 4,700 feet. From the Pennsylvania railroad to that township road it passes through an unimproved rural country, having in the vicinity of its line but one or two farm tenements and the 'Sheltering Arms and Old Woman's Home,' near to the Pennsylvania railroad. As to the present improvements along the line of this road, the road can be of no public utility. * * * The road of the length specified in its charter, as now made, could not be a conveyance for residents along its line to reach the Pennsylvania railroad. It would land them midway between stations. It could not afford to run trains frequently, and their proxin ity to the Pennsylvania railroad would render this road entirely unnecessary for their use. The adjacent ground is too costly for manufacturing sites, and better adapted for residences in the extension of the village of Wilkinsburg. There are many much cheaper sites for manufactories, within short distances, along the main line of the Pennsylvania railroad, where fuel could be obtained with equal cheapness, of as good quality as could be furnished by

this road of defendants, and where water, which this locality does not supply, could be had.

"The contingency for the use of this ground for manuf c-tories is so remote, and the advantage this road would be to them, so slight, that the master does not consider that the road of defendant would acquire therefrom any characteristic of being for public use.

"The defendants' company claim * * * that under their charter they have a right to extend the same by additional branches. That at and beyond the eastern terminus of their road there is a large coal field of some 1,500 or 2,000 acres, owned by different parties, and that it can not be mined and utilized for want of proper artificial access to, or means of reaching and mining the same, and the conveyance thereof to market. * * * That a branch of their road could be taken by a short tunnel through the hill at its eastern terminus, to a fertile valley called Crab valley; that by extending this branch north, up the valley, other coal fields could be reached which in being mined would bring a population to that locality, enhance the value of the lands, and afford a means of transportation therefrom to the Pennsylvania railroad and the city of Pittsburg, for persons and property. * * *

"The coal field extends north and eastwardly, from the eastern terminus of the Edgewood railroad to Thompson's run, at Turtle Creek station, on the Pennsylvania railroad, about thirteen miles east of Pittsburg union depot."

The master describes the character and size of the coal field, and the advantages which exist for mining it, etc.

He then proceeds:

"It also appears when the topography of the land is considered, with reference to the taking out of coal, and its transportation to the city of Pittsburg and western markets, that the location of the road is as good, and probably better, than any other that could be selected. * * *

"The Edgewood railroad can be of no public use to persons residing, or property located between its termini, and it may never have any branches or further extension. It is not likely to have any except into the coal. * * * There is not any coal shown by the defendants adjacent to Crab valley, which a branch of their road would reach, that would come out by

their road, except the Kelly coal, and they have shown conclusively that the better way to mine and take out that coal is by the Hampton coal openings. There would be no industry connected with coal mining in Crab valley; no inducement for increased population there on that account; no population there now, and no inducement either now or in the future to build a branch road into a locality so convenient to the main line of railroad that the branch would connect with if made, to wit, the Pennsylvania railroad.

"The master is therefore of the opinion, and so finds, that under the facts of this case, the only extension or branch of the defendants' road that is feasible, to the interest of its main line as described in its charter, would be a branch or branches through the coal field, through the stratum of coal, and for the sole use and purpose of transporting the coal when mined, and the carrying of persons and property connected with that business. He also finds that the only object and purpose of the construction of the Edgewood railroad was for the transporting of the coal from the Hampton coal mines, and such other coal in the adjacent coal field as might be brought to it or might be reached by it, by a branch or branches, into the coal of the field, to the Pennsylvania railroad. * * *

"The view taken by the master of the meaning of the term *public use* indicates to him the propriety of passing on this question as an open one. * * *

"The capacity of the Edgewood railroad when in complete working order will, according to the testimony, be 50,000 bushels per day. About 200,000 bushels of coal is contained in, and can be taken out of an acre of the coal field in question. And the Hampton Coal Company owning about 360 acres, their coal would be exhausted in about four years. * *

"If the Hampton Coal Company should acquire no additional coal lands hereafter, then when that which they now own would be exhausted, it would be the policy of, and a necessity for the Edgewood railroad to extend its road into the coal field, in order to realize a return of the outlay so made. So that it appears to the master to be immaterial whether the Hampton Coal Company purchases more coal, or the railroad company extends its road; in either event, the value of the coal in the whole field is greatly enhanced, the value of the

different tracts in the field equalized, and hundreds of acres of coal made accessible for use, that without the Edgewood railroad would have been locked up and inaccessible for the market.

"This, then, is wherein the Edgewood railroad is of utility. The mining of 50,000 bushels of coal per day would give employment to hundreds of persons. They must have homes near the mines and food to live on. Their wages would be spent in the neighborhood for rents and subsistence. The value of property would be enhanced thereby. All the owners of coal would be benefited by its increased value, and the public at large would be benefited by this coal field being brought into market, in the like manner that they are benefited by other developments of the mineral wealth of the State.

"Under the lateral railroad laws, the party proposing to build a road, has a right to designate the line of the route of his road, and if he can not agree with another party through whose land the road is to pass, an application must be made to the court to appoint a jury of three persons to decide the questions between the parties; and it is made the duty of these jurymen to decide upon the *necessity* for the road. This decision of the jury may be appealed from, and the litigation in connection with this proceeding may be lengthened out for years, by stubborn litigants and ingenious counsel. * * * The Acts of Assembly of 1868, and more particularly that of 1871 remedies this difficulty and evil. Under their provisions the power of *eminent domain* of the Commonwealth is vested in three or more persons to decide upon the *necessity for*, and to build a railroad, the construction of which must of necessity result in the beneficial effects and public good above indicated, with perhaps many other good results that have not suggested themselves to the master." * * *

The master reported as "a summary of his findings"—

1. The plaintiff had such title to the *locus in quo* as enables it to enter and prosecute this proceeding.

2. That the building of defendants' railroad through this property of plaintiff, destroys its value for the purpose intended by the plaintiff, viz., as an institution for the instruction of the deaf and dumb.

3. That the railroad of defendants is constructed from a point near to and west of Edgewood station, on the Pennsylvania railroad, as required by the charter of defendants' company.

4. That defendants' railroad is for public use in connecting the coal fields, within described, with the Pennsylvania railroad; being for the development of the coal mineral wealth of that neighborhood, in the transportation of coal from the Hampton coal mines, and such other coal as may be brought to it, or may be reached by its branches.

5. That while the eastern terminus of defendants' road is on the right of way of the Hampton Coal Company, that fact does not prevent the defendants from extending branches over or across the same.

6. That individual members of all the firms which own the Hampton coal mines, are stockholders in the Edgewood Railroad Company, and own together 240 shares of the stock of that company, which gives the said owners of stock the controlling interest therein.

7. That the defendants' railroad is located upon the best and most advantageous route to connect the said coal field with the Pennsylvania railroad, and that it is so located in conformity with the requirements of the charter of defendants' company and of the law.

Exceptions were filed to the report by both parties; those of the defendants were overruled and those of plaintiff sustained.

The court (KIRKPATRICK, J.) "decreed that said defendants be, and are hereby perpetually enjoined from constructing, maintaining and operating their railroad over, through and upon the premises of said plaintiff as described in said bill; that defendants restore said premises to the condition they were in when the said defendants committed the acts and grievances charged in said bill; and that said defendants pay all the costs in the case." * * *

The defendants appealed to the Supreme Court. They assigned the decree for error.

J. DALZELL, M. W. ACHESON and J. H. HAMPTON, for appellants.

S. SCHOYER and G. P. HAMILTON, for appellees.

Mr. Justice WOODWARD delivered the opinion of the court, January 4, 1876.

No doubt is entertained that at the time of the organization of the Edgewood Railroad Company, the plaintiffs had such title to the land which the defendants have appropriated, as to enable them to maintain this bill. The authorities referred to on the argument fully vindicate the finding of the master on the facts reported.

Voluminous as this record is, it presents but one significant question for discussion and decision. Can such a railroad as that which the facts found by the master prove the defendants to have built, be maintained under the provisions of the act "to authorize the formation and regulation of railroad corporations," passed on the 4th of April, 1868, and the supplement to it, passed on the 28th of April, 1871? It is alleged by the plaintiffs that these acts have been wrested from their intended purpose to secure a public benefit, in order to promote a purely private enterprise, and that the construction of their road by the defendants under the charter which they hold, has been a fraudulent evasion of the provisions of the statutes relating to lateral railroads.

The first section of the act of 1868 authorizes any number of citizens, not less than nine, to form a company for constructing a railroad for public use in the conveyance of persons and property. The supplement permits any number of persons not less than three, to form a company to construct, maintain and operate a railroad not exceeding five miles in length, for public use, as provided for in the original act. In pursuance of this legislation the defendants obtained their charter, the due legal form of which (except in an alleged inadequate description of the *terminus a quo*, not now material) is not contested. They have built and are operating a road forty-seven hundred feet in length, connecting with the Pennsylvania railroad at a point midway between the Edgewood and Wilkinsburg stations of that railroad, being fourteen hundred and fifty feet from each, and extending to a point on land leased by Dickson, Stewart & Co. for the defendants, from George R. Johnston,

on the 31st of March, 1873. The eastwardly portion of the road for the distance of seven hundred and eighty feet, as well as the eastern terminus, is on these leased premises, which include also the ground covered by the incline railway of the Hampton Coal Company, and extend to that company's coal openings. The grant to the lessees was "for a right of way for their coal railroad, and for no other purpose whatever, except such other purposes as are necessary for the ordinary working of coal works, and with the privilege of erecting thereon a blacksmith's shop, carpenter's shop, and an engine-house, but no other buildings whatever." The eastern terminus is in a ravine, which is simply a cave in the hills, surrounded by hills on both sides and at its eastern end, and the bed of the road at this point is one hundred feet below the level of the stratum of coal belonging to the Hampton Coal Company. All of the stockholders of the Edgewood Railroad Company are stockholders of the Hampton Coal Company, except J. McC. Creighton and Francis Ardary, and they can have an interest whenever they choose to pay for it. The railroad was projected and constructed with the primary object and design of connecting the Hampton mines with the Pennsylvania railroad in order that the coal from those mines should reach a market. Indeed, the master has found that this was the only object of the enterprise. In view of any present improvements along the line, it is of no utility. It is wholly unnecessary for the conveyance of passengers both at present and in the future, and the ground adjacent to it can never be used for manufacturing purposes. It was urged before the master that under the authority conferred by the act of 1868 to build branches, the road can be so extended as to develop a large and valuable coal field, containing some fifteen hundred or two thousand acres. This the master reports to be true. He finds that the Hampton company's coal will be exhausted in less than five years; that by a subterranean route the road can be so extended as to open availably to market the coal upon the lands lying between the present eastern terminus and Johnson's run; that it would be to the interest, both of the coal company and the railroad company, that some connection should be made with the unmined coal in the field, as rapidly as the vein is taken out of the field and exhausted; and that "if the Hampton

Coal Company should acquire no additional coal lands hereafter, then when that which they own would be exhausted, it would be the policy of and necessity for the Edgewood company to extend its road into the field, in order to realize a return of the outlay made." The report then continues in these words: "It appears to be immaterial whether the Hampton Coal Company purchase more coal, or the railroad company extends its road; in either event, the value of the coal in the whole field is greatly enhanced, the value of the different tracts in the field equalized, and hundreds of acres made accessible for use that without the Edgewood railroad would have been locked up and inaccessible for the market. This, then, is where the railroad is of utility. The mining of 50,000 bushels of coal per day would give employment to hundreds of persons. They must have homes near the mines and food to live on. Their wages would be spent in the neighborhood for rents and subsistence. The value of the property would be enhanced thereby. All the owners of coal would be benefited by its increased value, and the public at large would be benefited by this coal field being brought into market, in the like manner that they are benefited by other developments of the mineral wealth of the State." Upon grounds thus stated, the master found that the road was constructed for public use, and that its maintenance and operation are authorized by law. Exceptions filed to the report by the plaintiffs were sustained by the court below, and a decree was made enjoining the defendants from constructing, maintaining and operating their road upon the premises of the plaintiffs, and directing a restoration of the premises to the condition they were in when the grievances charged in the bill were committed. The case is here on appeal from this decree.

The legislation under which the rights of the defendants are asserted, confers large powers upon associations of individual citizens, the exercise of which may be capable of producing varied forms of mischief. The passage of the act of the 19th of June, 1871, therefore, was a wise and salutary measure of precaution. The first section of that act makes it the duty of the court in which any proceeding is pending, where an injury is alleged to have been caused by a corporation

claiming a right or franchise to do the act by which the injury is produced, to inquire and as certain whether the right or franchise claimed by the corporation is actually possessed. When this suit was commenced the defendants were engaged in constructing their railroad upon the land of the plaintiffs, and the complaint was that they were doing this in violation of law. It was alleged that a lateral railroad was being built for private purposes without compliance with the statutes authorizing such a road, and under cover of a charter obtained under the acts of 1868 and 1871. If the facts warrant the charges in the bill, the jurisdiction of the common pleas was unquestionable, and was discreetly exercised. Such a jurisdiction is in contravention of no rule which preserves legislative authority from judicial invasion. That the control of the right of eminent domain rests with the legislature (Cooley on Const. Limitations, 538), and that the degree of the public necessity for the exercise of that right is exclusively for their ascertainment (*Smedley* v. *Irwin*, 1 P. F. Smith, 445), is undoubted. But there does not appear to be anything in this case to require the application of any such principle. It is not necessary even to approach the question of legislative power to create this corporation, and to vest it with all the rights it claims. The inquiry is solely as to what has been the action of the corporation, and as to the extent to which the franchises it is exercising have been conferred.

The object for which the act of 1868 was passed is unmistakable. It was to vest in voluntary associations of individuals under definite, uniform and general rules, powers which had previously been given only by special acts of incorporation. It applied to railroad companies in the sense in which the term had always been commonly employed. Passenger railways were expressly excluded from its operation. The companies to be chartered under it were made subject to the provisions of the General Railroad Law of 1849, and not one word was contained in it by which the legislation in regard to lateral railroads could be affected. The act of the 28th of April, 1871, was a supplement to the act of 1868, simply reducing the number of the corporators to three in the case of a road not exceeding five miles in length. These corporators, however, were still to constitute a railroad company, subject

to the terms of the original act and to those of the act of 1849. Provision for so short a road could only have been made in order to secure some general public good. The supplement was manifestly intended to apply to settled communities with a population at least so moderately dense as to require more than primitive means of conveyance, and with industries so varied and diversified as to require more than primitive facilities for the transporation of the products of machinery, labor and land. It was passed to provide for the convenience and necessities of masses of men, and not to promote private fortunes or develop private property. The Commonwealth transfers to her citizens her power of eminent domain only when some existing public need is to be supplied, or some present public advantage is to be gained. She does not confer it with a view to contingent results which may or may not be produced, and may or may not justify the grant, as a projected speculation may prove successful or disastrous. Provision of the most ample kind has been made to meet individual requirements. The lateral railroad statutes afford every necessary facility for developing private property and transporting its products. And there are substantial reasons why the field within which those statutes operate should not be invaded. Owners of lands are protected by safeguards in their provisions which do not shield them when public ends are to be promoted. They have the right to demand the interposition of those safeguards when private property is appropriated for strictly private use.

The facts found by the master prove in the distinctest way that this railroad is a mere appurtenance to the mines of the Hampton Coal Company. The reasons for his decision that it has been constructed for public use are speculative, strained and vague. They have in view remote and contingent conditions of the realization of which nothing even of probability is shown by the report. The road is completed between the termini specified in its charter. The capital of the corporation has been nearly if not entirely expended. It can not of course be said that it is impossible that new capital shall be subscribed, the hill that bounds the eastern terminus tunneled, the coal lands beneath which the extension may be constructed developed, and industries created that would make

the enterprise of public importance and public use. But all these possibilities are too remote to be ground for anything beyond conjecture. To rest the legal rights of parties on such chances would be simply to obliterate those rights. In its existing condition, not one element of public advantage has resulted from this road that would not be gained by the construction of any lateral railroad extending from a great highway like the Pennsylvania railroad to coal mines of the kind and capacity of those of the Hampton company. For the distance of seven hundred and eighty feet, including the eastern terminus, the defendants are precluded from affording facilities for any business but their own by the very terms of the grant of the right of way they obtained from Johnston. They are confined to the use of the land for such purposes as are connected with the ordinary working of coal property. "The conveyance of persons and property," in the sense in which those words are used in the act of 1868, would be out of the question. The connection with the Pennsylvania railroad is at a point fourteen hundred and fifty feet from any station, nearly one third of the entire length of the Edgewood road, and the statement of the fact is alone sufficient to make any idea of using it for the conveyance of passengers preposterous. There is the coal of the Hampton company to be carried, and there is nothing else.

Hardly as the rule may bear on these defendants, it is the plain duty of the courts to prevent the perversion of enactments passed for one purpose in order to subserve other and inconsistent objects. To every legal intent this road is a lateral railroad. The right and franchise which the defendants claim to construct, maintain and operate it, was not conferred by the acts of 1868 and 1871, and the charter in pursuance of them which they have obtained. In reality it has been throughout the property of the Hampton Coal Company as exclusively as the incline railway, schutes and fixtures at their mines. It is no more within the general railroad legislation of the State than was the road which was enjoined by this court under the powers granted by the act of the 19th of June, 1871, in *McCandless' Appeal*, 20 P. F. Smith, 210. It has been built in sheer defiance of legal provisions, the due observance of which could alone have

justified its existence, and its maintenance would be a fraud upon the law.

To prevent the chance of misconception, the statement is repeated that the question of the legislative power to grant the right of eminent domain to associations of individuals for corporate purposes, has not been considered. It may be added that nothing which has been said has been designed to affect, limit or disturb the corporate organization or the general corporate power of the Edgewood Railroad Company. The points decided are briefly recapitulated:

I. When the bill was presented to the common pleas, the plaintiffs had title to the land the defendants had appropriated.

II. On this land the defendants have laid and are operating a lateral railroad for private use, without the observance of any of the forms prescribed by the lateral railroad statutes.

III. The acts of 1868 and 1871 were passed to provide for the organization and regulation of railroad corporations authorized to construct railroads, subject to the provisions of the General Railroad Law of 1849, for public use.

IV. The character of the defendants did not warrant the appropriation they have made of the land of the plaintiffs for the purpose to which they have applied it. They are trespassers, as they would be if, under cover of their charter, they had entered on the land to build a turnpike or open a mine.

V. It follows that the defendants do not possess the right or franchise to do the acts which have resulted in the injury of which the plaintiffs complain. And in the circumstances of this case, under the act of the 19th of June 1871, a bill for an injunction is the appropriate remedy for the wrong.

Decree affirmed and appeal dismissed at the costs of the appellants.

DAYTON GOLD AND SILVER MINING COMPANY v. SEAWELL, District Judge.

(11 Nevada, 394. Supreme Court, 1876.)

[1]**Condemnation of land for benefit of mines.** The act of the legislature of Nevada entitled "An act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada," allowing, among other things, the condemnation of land for the purpose of transporting timber necessary to work a mine, is constitutional.

Necessity and public advantage must combine. Private property can not be taken for private use, nor is the fact that its use will be for the advantage or benefit of the public a sufficient ground for taking it; there must be combined with the public advantage a necessity for the exercise of the right of eminent domain.

[2]**Legislative construction should prevail in case of doubt.** While the declarations of the legislature that "mining, milling, etc, are for the public use, and the right of eminent domain may be exercised therefor" are not conclusive upon the courts, yet it is only when the legislature has passed beyond the limits of its constitutional power that courts are authorized to interfere, and in cases of doubt the construction given to the constitution by the legislature ought to prevail.

Definition of public use. Any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use.

Original application before the Supreme Court for a writ of peremptory mandamus.

The facts are stated in the opinion.

WHITMAN & WOOD and C. J. HILLYER, for petitioner.

DE LONG & BELKNAP, STONEHILL & FOOTE, and THOMAS H. WELLS, for respondent.

By the Court, HAWLEY, C. J

The petitioner applies for a writ of mandamus to compel the respondent, as district judge of the third judicial district, to forthwith proceed to hear a certain petition by it filed and presented under the provisions of the statute of this State entitled: "An act to encourage the mining, milling, smelting or

[1] Contra, *Cons. Channel Co.* v. *Cent. Pac. R. R.*, 5 M. R. 438; *Valley City Co.* v. *Brown*, 5 M. R. 397—but followed in same court, *Orerman Co.* v. *Corcoran*, 1 M. R. 691.

[2] The question a judicial one, *In re Deansville Cemetery*, 66 N. Y. 569.

other reduction of ores in the State of Nevada" (approved March 1, 1875), wherein it is, among other things, alleged that petitioner desires to acquire a strip of land in possession of, and claimed by one James Waddell; that it is necessary for petitioner to obtain this land in order to transport the wood, lumber, timbers and other materials, to enable it to conduct and carry on its business of mining; and petitioner therefore prays that respondent may be compelled to appoint commissions, whose duty it shall be to determine and assess the compensation to be paid for such land, and in all respects to proceed and make such orders as may be necessary, or proper, in pursuance of the provisions of said act. The respondent refused to act in the premises, because, in his judgment, the act in question is unconstitutional and void. He claims that the act is in direct violation of the provision of section eight, article one, of the constitution, which declares that no person shall be 'deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made or secured."

The law, in our judgment, is well settled that, under this provision of the constitution, private property can not be taken for a private use. The property of a citizen can only be taken by an act of the legislature for a public use, when a necessity exists therefor, and when compensation to the owner has first been made or secured. Whenever, therefore, the legislative power of appropriation of the private property of a citizen is attempted to be exercised, the true test of its validity is, whether or not the use for which the property is to be appropriated is a "public use," within the meaning of these words as used in the constitution.

The first section of the act in question declares that "the production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor." (Stat. 1875, 111.)

It is contended by petitioner that this declaration of the legislature is conclusive upon the courts; in other words, that

it is not within the legitimate province of the judiciary to control the judgment or decision of the legislature. There are some very respectable opinions which tend to support this view; but the decided weight of the authorities as well as reason is against it. As we construe the provision of the constitution, there is a limit upon the exercise of legislative power which prohibits that body from enacting any law which takes the property of one citizen and gives it to another for a private use, and if the legislature has, in the passage of this act, gone beyond this limitation, it is the clear and positive duty of this court to declare the act unconstitutional and void. But in this connection it must, as we think, be admitted that although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the State government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.

Before we discuss the main questions presented for our decision, it is proper to state that we have nothing to do with the wisdom, policy, justice, or expediency of the law. These are matters of which the legislative and executive departments of the State government are the sole judges; and even if we differed in opinion with them upon any of these grounds, we could not, for such reason, declare the act invalid. In the consideration of this case, these questions will be treated as settled by the passage and approval of the act. The remedy for unwise or oppressive legislation, when within constitutional limits, is by an appeal to the justice, intelligence, patriotism, and protection of the representatives of the people. It is only in cases where the Federal, or State constitution limits the legislative power, and controls the will of the legislature by a paramount law, that courts are authorized to interfere and declare any legislative enactment void. These general principles are axiomatic in the jurisprudence of this country.

This brings us to the direct question: What is the meaning of the words "public use" as contained in the provision of our State constitution? It is contended by respondent that these words should be construed with the utmost rigor against those who try to seize property, and in favor of those whose property

is to be seized. In other words, that in favor of private rights the construction should be strict; that the words mean possession, occupation, or direct enjoyment by the public. On the other hand, it is claimed by petitioner that courts should give to the words a broader and more extended meaning, viz., that of utility, advantage or benefit; that any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use. No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use" as found in the different State constitutions regulating the right of eminent domain. The reasoning is, in many of the cases, as unsatisfactory as the results have been uncertain. The beaten path of precedent to which courts, when in doubt, seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it. Upon examining the authorities, we find that private property has been taken under a similar provision in the different State constitutions, for the purpose of making public highways, turnpike roads and canals; of building railroads; of constructing wharves and basins; of establishing ferries; of draining swamps and marshes; of bringing water into cities and towns; of the establishment of water-power for manufacturing purposes; of laying out a public park; of constructing sewers; of erecting levees, to prevent inundation; of building lateral railroads to coal mines; of laying pipe for the transportation of oil from oil wells to a railroad; of laying gas-pipes; of disposing of stagnant and offensive water, etc., etc.

It has frequently been decided that the public have an interest in the use of a railroad because it increases the facility for travel and transportation from one part of the country to another, and every citizen may use it by paying the usual

rates of fare; the owners may also be prosecuted for any damage sustained by their refusal to transport individuals or their property upon the payment of the fare or freight. A turnpike is said to be for a public use because every man can, with his own horses and teams, or on foot, travel upon it for a fixed compensation, and the legislature may, from time to time, limit the amount of toll which the owners may take, and regulate the franchise under which their right to collect tolls exists. The same principle has been applied to many of the other enumerated cases. It is, however, evident that the act in question can not be sustained upon any such reasoning. It can only be sustained, if at all, by adopting the theory advanced by petitioner's counsel. The issue is clearly presented and it ought to be fairly met. That the purposes mentioned in the act "are of vital necessity to the people of this State," can not be denied; that mining is the paramount interest of the State is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the State is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this State, is a self-evident proposition. Hence, it necessarily follows that if the position contended for by petitioner is correct, and I believe it is, then the act is constitutional and should be upheld. Although other and weaker reasons have more frequently been assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given.

Chancellor WALWORTH, in *Beekman* v. *Saratoga and Schenectady Railroad Co.*, advanced the doctrine that if the public interest could in any way be promoted by the taking of private property, that it must rest in the wisdom of the legislature to determine whether the benefit to the public would be of sufficient importance to render it expedient for them to exercise an interference with the private rights of individuals for that purpose, and said: "It is upon this principle that the legislature of several of the States have authorized the condemnation of the lands of individuals for mill sites, where from the nature of the country such mill

sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads and canals. * * * In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government or through the medium of corporate bodies or of individual enterprise." (3 Paige, 73.) The same views were again expressed by the learned chancellor and adhered to by a majority of the court in *Bloodgood* v. *The Mohawk and Hudson Railroad Company*, 18 Wend. 13.

In *Gibson* v. *Mason*, LEWIS, C. J., after declaring that property could only be taken for public uses, says: "A railroad must then, whenever the right to take private property is given to it, * * * be held to be a public work and for the public benefit." (5 Nev. 308.) And in this opinion the language of Chancellor WALWORTH, in the case of *Beekman* v. *The M. & S. R. R. Co.*, is quoted with approval. But the cases more directly in point, where the decisions are solely based upon this ground, are to be found in the States where a construction is given to what are known as the "mill-dam" or "flowage" acts. It is true that these acts in Massachusetts, owing to some of the provisions of the constitution of that State could perhaps have been upheld under the existing colonial laws in force in that State, in relation to the rights of proprietors of land traversed by mill streams at the time of the adoption of the State constitution, but the reasoning of the courts in sustaining the acts is generally, if not universally, based upon the grounds relied upon to sustain the validity of the statute of this State.

In *Boston and Roxbury Mill Corporation* v. *Newman*, wherein the validity of a special act which authorized the taking of private property of certain flat grounds to constitute a receiving basin, so as to enable the corporation to carry on its enterprise was drawn in question, the court, after tracing the history of the mill-dam acts back to their provincial

origin and declaring that there was no difference in principle between the special act and the mill-dam acts under the colonial laws, sustained the validity of the act, and in the course of the opinion say: "The principle is that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most it is a forced sale to satisfy the pressing want of the public." (12 Pick. 480.) The principle is better stated by Chief Justice SHAW, who delivered the opinion of the court in *Hazen* v. *Essex Company*. In this case the defendant was incorporated for the purpose of erecting a dam across the Merrimack river and constructing one or more locks and canals, to remove obstructions in said river by falls and rapids, and to create a water power to be used for mechanical and manufacturing purposes, and it was contended that the act was void because it authorized the taking of property for a private use, and the main question, discussed in the opinion, was whether the use was public or private. The court say: "The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the Commonwealth seems to have been regarded by the legislature and sanctioned by the jurisprudence of the Commonwealth, and in our judgment rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain." (12 Cush. 477.)

But still clearer and more direct is the language of BIGELOW, C. J., speaking for the court in the subsequent case of *Talbot* v. *Hudson*. "In many cases there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal or a highway, it would clearly fall within the first class; if it is transferred from one person to another or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly

said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. In the present case, there can be no doubt that every owner of meadow land bordering on these rivers, will be directly benefited, to a greater or less extent, by the reduction of the height of the plaintiff's dam. The act is, therefore, in a certain sense, for a private use, and inures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are, therefore, to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found then we are bound to suppose that the act was passed in order to effect it. * * * It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." (16 Gray, 423.)

The principle announced in these cases was approved and

followed by a majority of the court in *Newcomb* v. *Smith*, 2 Pin. (Wis.) 131. It must, however, be admitted, that the value of this case as an authority is materially weakened by a very able dissenting opinion delivered by LARRABEE, J., and concurred in by Chief Justice STOW, and the fact that in *Fisher* v. *Horicon Iron and Manufacturing Company*, 10 Wis. 351, and other subsequent cases, the Supreme Court of that State question the correctness of the conclusion reached by the majority of the court in *Newcomb* v. *Smith*, that the "mill-dam" law was constitutional, but adhere to it solely upon the doctrine of *stare decisis*.

In Connecticut the doctrines advanced in the Massachusetts cases are fully supported. Especially is this true of the reasoning of the Supreme Court in *Olmstead* v. *Camp*, sustaining the validity of the flowage act of that State. It was there contended that the act manifestly authorized the taking of property for private use; that in order to sustain the law it must affirmatively appear that the public have an interest in the thing to be taken; that there must be a public right of control of the thing taken as property in which the State has an interest; that the thing taken is to be used by the public, and is taken that it may be so used. In discussing this question the court say: "One of the most common meanings of the word 'use' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' Public use may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit, so that any appropriating of private property by the State under its right of eminent domain for purposes of great advantage to the community, is a taking for public use." (33 Conn. 546.) This decision directly declaring that the "term 'public use' is synonymous with public benefit or advantage" was concurred in by all the judges except HINMAN, C. J., who dissented. In the subsequent case of *Todd* v. *Austin*, 34 Conn. 79, the court, notwithstanding the able arguments of learned counsel, who sought by numerous references to decide cases to show that the reasoning of the courts in sustaining the mill acts of Massachusetts did not apply in support of the flowage act of Connecticut, sustained the decision in *Olmstead* v. *Camp*. In New

Hampshire the same construction is given to a similar provision of the State constitution in the case of *The Great Falls Manufacturing Company* v. *Fernald.* In this case the petitioners were incorporated, under the authority of the legislature, for the purpose of carrying on the manufacture of cotton and woolen goods; they expended large sums of money in constructing dams and other works, and obtained a water power on Salmon Falls river sufficient for large and successful works. The defendant claimed title to a small and not valuable piece of land which was flowed by the dam of petitioners; he unreasonably refused to part with the land, and the business of petitioners was in danger of being interrupted and embarrassed, if not entirely defeated by this obstinacy on the part of defendant. "The question is," say the court, "whether it is of such public advantage that this obstacle to the successful prosecution of the petitioners' business should be removed on payment of just compensation to the defendants, that the right would be taken for a public use within the meaning of the term as used in the law on that subject and in the constitution of this State.. Or, to put the question in a general form, is it of such general public advantage that the streams and waters of this State should be brought into practical use for manufacturing purposes, that a private right standing in the way of an enterprise designed to accomplish extended and connected improvements in the water power of a large stream, * * is taken for a public use when taken to advance such an enterprise and remove an obstacle to its success?" (47 N. H. 456.) The question was answered in the affirmative and the act authorizing the property to be taken was sustained by a full bench.

The Supreme Court of New Jersey, in the case of *The Tide-Water Co.* v. *Coster*, held that the right of eminent domain could be employed for the purpose of reclaiming large tracts of tide-water land, and based its decision upon the ground that "it is the resulting general utility which gives such enterprises a kind of public aspect, and invests them with privileges which do not belong to mere private interests." (18 N. J. Eq. 521.) These views were approved and followed in the matter of the application for drainage of lands between *Lower Chatham and Little Falls, in the counties of Passaic, Essex*

and Morris, 35 N. J. L. 497. The general principle upon which all of the foregoing cases were decided is sustained by the reasoning of the courts in the following additional cases: *In re Morris Canal and Banking Co.*, 39 N. Y. 171; *Bloomfield and Rochester Nat. Gas Light Co.* v. *Richardson*, 63 Barb. 437; *Venard* v. *Cross*, 8 Kansas, 248; *Harding* v. *Funk*, 8 Id. 315 ; *Bankhead* v. *Brown*, 25 Iowa, 540.

The cases of *Hays* v. *Risher*, 32 Penn. Stat. 169, sustaining the constitutionality of the Lateral Railroad Act, and *The West Vir. Trans. Co.* v. *The Volcanic Oil and Coal Co.*, 5 W. Va. 382, sustaining the constitutionality of an act authorizing the plaintiff to construct and maintain a line or lines of tubing for transporting petroleum or other oils through pipes of iron or other materials to any railroad, navigable stream, etc., are not in my judgment distinguishable in principle from the act under consideration; but the reasoning of the courts in support of the validity of said acts is to some extent based upon other grounds.

In Minnesota the Supreme Court, in *Miller* v. *Troost*, held that the act relating to "dams and mills" went to the extreme limit of legislative power, and after expressing the opinion that if such laws had not been sustained by the courts of other States, they would hesitate long before upholding the act, say: "The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional." (14 Minn. 369.)

In the light of these authorities, nearly all of which were decided prior to the adoption of our State constitution, I think it would be an unwarranted assumption upon our part to declare that the framers of the constitution did not intend to give to the term "public use" the meaning of public utility, benefit and advantage, as construed in the decisions we have quoted.

The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam, or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this State. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made

profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the State. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining, milling, smelting, or other reduction of ores," it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth, and a road to and from the mine is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now it so happens, or at least is liable to happen, that individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass if not entirely defeat the business of mining in such localities. In my opinion the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this State many of the advantages which other States possess, but by way of compensation to her citizens, has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.

But it is argued that, in sustaining this act upon the principles we have announced, there is no limitation to the exercise of legislative will in the appropriation of private property. After a thorough investigation of this question, I am of opinion that this argument is more specious than sound. It is an easy task to imagine occasional cases of individual hardship

in the practical operation of any law, and this statement is certainly true of all laws passed in the exercise of the power of eminent domain, because it will always be difficult, in following any rule, to mark out with precision the boundary line beyond which the legislature can not go. Each case when presented must stand or fall upon its own merits, or want of merits. But the danger of an improper invasion of private rights is not, in my judgment, as great by following the construction we have given to the constitution as by a strict adherence to the principles contended for by respondent. If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad.

One purpose is, so far as the legal rights of the citizen are concerned, as public as the other. The same principle is applicable to theaters. All citizens have the undoubted right, upon the payment of the price of admission, to attend all places of public amusement. Stage coaches and city hacks would also be proper objects for the legislature to make provision for, for these vehicles can, at any time, be used by the public upon paying a stipulated compensation. It is certain that this view, if literally carried out to the utmost extent, would lead to very absurd results, if it did not entirely destroy the security of the private rights of individuals. Now while it may be admitted that hotels, theaters, stage coaches, and city hacks, are a benefit to the public, it does not, by any means, necessarily follow that the right of eminent domain can be exercised in their favor. The truth is, that there is a wide distinction between railroads and hotels, and also between the business of mining and that of conducting theaters. A railroad, to be successfully operated, must be constructed upon the most feasible and direct route; it can not run around the land of every individual who refuses to dispose of his private property upon

reasonable terms. In such cases the law interferes, and takes the private property of the citizen upon payment of a just compensation, in order to promote an interest of great public benefit to the community, which could not be successfully carried on without the exercise of this power of eminent domain. The same principle applies to the business of mining, but it can not reasonably be applied to the building of hotels or theaters. In the building of hotels and theaters the location is not necessarily confined to any particular spot, and it is always within the reach of capital to make the proper selection, and never within the power of any individual, or individuals, however stubborn or unreasonable, to prevent the erection of such buildings. The object for which private property is to be taken must not only be of great public benefit and for the paramount interest of the community, but the necessity must exist for the exercise of the right of eminent domain.

The property of the citizen is sufficiently guarded by the constitution, and he is protected in its enjoyment and use, except in the extreme cases of necessity where it is liable to be taken for the purpose of advancing some great and paramount interest which tends to promote the general welfare and prosperity of the State; and when it is understood that the exercise of this power, even for uses confessedly for the public benefit, can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation to the citizen whose property is thus taken, none of the dangers of future legislation predicted by respondent's counsel is at all likely to happen. But if in error in this respect, this court, as already stated, is powerless to furnish the remedy. The fact is, as was clearly stated by Justice BEATTY, in *Ex parte Spinney*, 10 Nev. 333, that the protection which the people of the State enjoy against unjust and absurd legislation, "is not derived from constitutional restrictions, but from the force of public opinion and the character of our representatives. This court has the power to keep the legislature within the terms and plain import of the constitution. To

superintend the conscience and intelligence of legislatures, and see that they pay a due regard to considerations of justice and expediency in the enactment of laws, is the business of the people."

We are of opinion that the present law can be enforced by the courts so as to prevent its being used as an instrument of oppression to any one. But if, in its practical operations, it is found to be incompatible with a just preservation of the rights of individuals in private property, it will be the duty of the legislature to repeal the act, and to that tribunal instead of this must the argument of injustice be made. Whether we look at this act in the light of the interpretation which has been given to the term "public use" in the constitution of other States, to our own reasoning and construction of the language of the State constitution, or, to the character of the business and the natural production and resources of this State, we are irresistibly drawn to the conclusion that the act is constitutional and valid.

It is, therefore, ordered that the writ of peremptory mandamus be issued.

CONSOLIDATED CHANNEL COMPANY v. THE CENTRAL PACIFIC RAILROAD COMPANY ET AL.

(51 California, 269. Supreme Court, 1876.)

Condemnation for flumes and tunnels not of public use. Subdivision 5 of Sec. 1238 of the Code of Civil Procedure, authorizing the exercise of the right of eminent domain to condemn land for tunnels, flumes, ditches, dumps, etc., for working mines, and declaring them to be public uses, is unconstitutional and void.

Legislative assertions void when in contradiction of facts. The courts are not bound by the declarations of a legislature that a certain business is a public use, when it is manifestly of a private nature.

Appeal from the District Court of Nevada County, Fourteenth Judicial District.

The plaintiff was a corporation, and was the owner of and engaged in working a gold mine on Squirrel creek, in the

county of Nevada, of the value of sixty thousand dollars, and had expended large sums of money in opening and developing its mine. The grade of Squirrel creek below the mine was light, and the only practicable method of working the mine was to excavate a ditch, and build a flume through the mine and for a considerable distance below, so as to carry off the tailings, and then have a place of deposit for the tailings at the end of the flume. In order to do this, it was necessary to pass over and use land belonging to the defendants. This action was commenced in the district court for the purpose of condemning such land.

The defendants demurred to the complaint, and the court sustained the demurrer. The plaintiff declined to amend, and final judgment was rendered for the defendants. The plaintiff appealed.

HAMILTON & DUNLAP, for the appellant.

As to whether the legislative determination that a particular use is a public use, within the meaning of the chapter on eminent domain, is open to judicial review. See *S. & V. R. R.* v. *Stockton*, 41 Cal. 148; Cooley on Const. Lim. 488; *Harding* v. *Goodlett*, 3 Yerg. 53; *Booth* v. *Town of Woodbury*, 32 Conn. 128; *Broadhead* v. *City of Milwaukee*, 19 Wis. 652; *Napa V. R. R. Co.* v. *Napa County*, 30 Cal. 437; *Beekman* v. *Saratoga & Schenectady R. R. Co.*, 3 Paige, 73; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 251; 41 Cal. 147; Cooley, Const. Lim. 528.

"Private property can only be taken pursuant to law, but a legislative act, declaring the necessity, being the customary mode in which that fact is determined, must be held for this purpose 'the law of the land,' and no further finding or adjudication can be essential unless the constitution of the State expressly requires it": *Kramer* v. *Cleveland & Pittsburg R. R. Co.*, 5 Ohio, N. S., 146; cases deciding the constitutionality of acts authorizing mill sites to be condemned under eminent domain: 5 Pick. 294; 23 Id. 220; *Hazen* v. *Essex Co*, 12 Cush. 477; *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; *Newcomb* v. *Smith*, 1 Chand. (Wis.) 71; *Thien* v. *Voegtlander*, 3 Wis. 461; *Stowell* v. *Flagg*, 11 Mass. 364.

NILES SEARLES, ROBERT ROBINSON and DIBBLE & BYRNE, for the respondents.

We claim that if our code has, by a sweeping clause, determined all uses for mining purposes to be "public uses," where, as in this case, the use is manifestly a private one, then, under the doctrine as laid down in *Stockton & Visalia R. R. Co.* v. *City of Stockton*, 41 Cal. 169, we may invoke the aid of this court: *Curtis* v. *Whipple*, 24 Wis. 350, and American Rep., Vol. 1. p. 187; *Whiting* v. *Fond du Lac R. R.*, 3 American Rep. 30; *Varick* v. *Smith*, 5 Paige, 159.

By the Court, NILES, J.

The plaintiff by this proceeding sought to procure, by condemnation, certain lands belonging to the several defendants, to serve as a site for a bed-rock flume to carry the dirt and gravel from its mining claims, and also as a place of deposit for the tailings and refuse matter from its claims.

The demurrer raises the question of the constitutionality of subdivision five of section one thousand two hundred and thirty-eight of the Code of Civil Procedure, authorizing proceedings of this character.

This statute provides that the right of eminent domain may be exercised in behalf of certain enumerated public uses, and in subdivision five, names among other things, "tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from the mines."

It is clear, from the averment of the complaint, that the object sought is the appropriation of the private property of the defendants to the private use of the plaintiff. The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the con-

stitution which permits the taking of private property for a public use after just compensation made.

In the case of *Loan Association* v. *City of Topeka*, 20 Wall. 655, the defendant, acting under the authority of an act of the legislature of Kansas, had issued certain bonds to the plaintiff as a donation, to encourage that company in its design of establishing a manufactory of iron bridges in that city. The act gave to the city council "power to encourage the establishment of manufactories, and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund, or by the issuance of bonds of such city in such amounts as the council may determine."

The court held that the purpose for which the bonds were issued was not of a public character; that the statute authorizing their issue was unconstitutional and void, and that no lawful tax could be levied for their payment. Mr. Justice MILLER said, in announcing the opinion of the court: "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town."

The reasoning of that opinion is applicable to the present case. It is not competent for the legislature to authorize the levy of a public tax, or the taking of private property for the encouragement of a purely private industry.

But it is contended by the counsel for the plaintiff that the statute referred to (Sec. 1238, subd. 5, C. C. P.) is a legislative declaration that the construction of ditches, flumes and dumping places for working mines, are public uses, in behalf of which the right of eminent domain may be exercised; and they invoke the doctrine that the judgment of the legislature upon such questions is conclusive, and is not open to review by the judicial department of the government. Without doubt it is the general rule that where there is any

doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in this regard. This question was fully discussed, and the doctrine established, in the case of *S. & V. R. R. Co.* v. *City of Stockton*, 41 Cal. 147. But in the same case an exception to the general rule is recognized. It is said: "A case might, indeed, be presented in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public; or, in the language of Chancellor WALWORTH, 5 Paige, 159, 'where there was no foundation for a pretense that the public was to be benefited thereby'; and in such case it would be our duty to interfere and afford relief."

It would be difficult to suppose a case more completely within the exception stated, and in which the absence of all possible public interest in the purposes for which the land is sought to be condemned is more clear and palpable than in the case at bar.

We are of the opinion that the demurrer was properly sustained.

Judgment affirmed.

1. Proprietor of land over which a turnpike road passes, retains his exclusive right to the minerals therein: *Kelly* v. *Donahoe*, 2 Metc. (Ky.) 482.

2. Liability for stone previously taken does not cease upon subsequent condemnation of the land: *Higgins* v. *Reynolds*, 31 N. Y. 151.

3. Coal in lands condemned under the Pennsylvania Canal Acts belongs to the Commonwealth: *Wyoming Co.* v. *Price*, 81 Pa. St. 156.

4. Mining under canal whose owners reject their statutory election to pay for the minerals: *Wyrley Co.* v. *Bradley*, 2 M. R. 89.

5. Dedication of streets to a town, vesting a fee simple, carries underlying coal: *Des Moines* v. *Hall*, 24 Iowa, 235. But dedication of lands known to contain minerals "for street purposes and those only," *held* to not carry the minerals: *Dubuque* v. *Benson*, 23 Iowa, 248.

6. Party accepting the compensation provided by statute can not afterward impeach the formality of the proceedings: *Hatch* v. *Hawkes*, 126 Mass. 177.

7. Act allowing condemnation for ditches, tunnels, etc., does not take away previous rights of like character, allowed by custom: *Bliss* v. *Kingdom*, 46 Cal. 652; *Post* WAY.

8. Eminent domain not given by implication to mining companies to build railroads under the "Acts in relation to railroads": *Miami Co.* v. *Wigton*, 19 Ohio St. 560.

9. A ditch to supply mines of private persons can not be condemned as a ditch for public use: *Cummings* v. *Peters*, 56 Cal. 593.

10. Constitutionality of and practice under the Lateral Railroad Act of Pennsylvania: *Harvey* v. *Lloyd*, 3 Pa St. 331; *Lance's App.*, 56 Id. 16; *Waddell's App.* 84 Pa. St. 90.

11. Railroad to private mines condemned under pretense of public use: *Peo.* v. *Pittsburg Co.*, 53 Cal. 694; *Post* QUO WARRANTO. Land for shaft to strike mine on the dip, condemned under Nevada Statute: *Overman Co.* v. *Corcoran*, 1 M. R. 691.

12. Covenant between servient tenement and railroad to work the mines under road-bed: *Mine Hill Co.* v. *Lippincott*, 86 Pa. St. 468; *Post* RAILROADS.

13. Ditch can not be constructed across lands without condemnation: *Titcomb* v. *Kirk*, 5 M. R. 10.

14. The right to condemn lateral railroad from mines is based upon the supposition of connecting them with a highway, and that the public shall have an implied license to use them: *Waddell's App.*, 84 Pa. St. 90.

15. Legislature may authorize the condemnation of private property by a mining company for the construction of a railroad to transport coal from its mines: *New Central Coal Co.* v. *George's Creek Coal and Iron Co.*, 37 Md. 537.

16. Compensation allowed to mine owner for future but ascertainable expenses and losses: *Whitehouse* v. *The Wolverhampton and Walsall Railway Co.*, L. R. 5 Ex. 6.

JONES v. BOLLES.

(9 Wallace, 364. U. S. Supreme Court, 1869.)

Equitable jurisdiction. Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. And it is the only court for relief where the relief must consist in annulment.

[1] **Corporation interested as plaintiff, made defendant.** Where it is sought to enjoin the collection of purchase money from a corporation on the ground that the complainants—the stockholders—were induced to buy on representations that its property was unincumbered, its own agents also joining in the misrepresentation, the company may properly be made a defendant, although the relief prayed for would operate in its favor.

Proof of complainant's interest in the issue. Complainant having averred an interest in the stock, and acts of defendant tending to depreciate its value, the averment of the amount of interest not being denied, but only ignorance of the fact by defendant stated—and the proof showing his purchase—there is sufficient averment and proof of complainant's interest.

Appeal from the Circuit Court for the District of Wisconsin; the case being thus:

Bolles, a citizen of Massachusetts, on behalf of himself and all other stockholders of the Mineral Point Mining Company, filed his bill of complaint in the court below against one Jones and the said company—the former a citizen and the latter a corporation of Wisconsin—for an injunction to restrain Jones from suing for, claiming or demanding against the said company the purchase money of a certain tract of mining land in Wisconsin, or any mineral rents for mineral raised on the same. The matter set forth in the bill as a ground for this relief was a charge of misrepresentation and fraud on the part of Jones, perpetrated at Boston, in Massachusetts, in November, 1865, whereby he induced him, the complainant Bolles, who was a broker, to purchase for himself and other persons a large amount of the capital stock of the said mining company. The substance of the specific charges was that Jones and others, agents of the company, represented to him, the complainant Bolles, that the company was seized in fee of the said tract of land; that it had been conveyed to

[1] *Crump* v. *U. S. M. Co.*, 3 M. R. 455; *Robinson* v. *Smith*, 3 M. R. 443.

the company by him, Jones, for the consideration of $30,000, which had been fully paid and satisfied, and that the title of the company was perfect and unincumbered; and, to beget further assurance in him, the complainant, that they exhibited a warranty deed from Jones to the company, and an abstract of title showing an unincumbered title to the lands; that they further represented that the land was of great value for mining purposes, and that Jones had no interest in the property; that the complainant, being entirely ignorant of the facts except as represented to him by Jones, and relying on those representations, purchased on his own account and in trust for others a large amount of the capital stock of the company, and paid upward of $25,000 for it, and afterward sold still larger amounts to parties who paid for the same on the faith of the said assurance that the property was unincumbered. The bill then alleged that, at the time of the giving of the deed referred to, an agreement was made between Jones and the company (a copy of which was set out), the existence of which was carefully concealed by Jones when he made the representations complained of (but which he now asserted to be valid and subsisting), by which he claimed a large balance to be due to him for mineral rents and purchase money of the said lands, and threatened to bring an action against the company therefor, which, if successful, would greatly depreciate the stock of the company and seriously embarrass it.

Jones, in his answer to the bill, denied the principal charge in the aggregate as made (a mode of answer which this court observed, in passing, was altogether too narrow a mode of denial), admitted that he, with the president and secretary of the company, were in Boston at the time alleged, and attended a meeting at Bolles' house on the subject, and that he understood that the secretary had made representations to the effect complained of, but that the room was large and pretty well filled, and that he did not hear it. That he afterward expostulated with the secretary for having made such a statement, and took some pains to inform some persons that it was not true. But he did not allege that he ever so informed the complainant. He denied that he made any such representations himself. He admitted the agreement complained of, and insisted upon its validity. He did not deny Bolles' in-

terest as alleged in the stock of the company, though he averred ignorance on the subject. Other points were made in the answer, but what has been stated is sufficient to show the principal issue made in the suit.

The circuit court, after full proofs, which showed, among other things alleged, the purchase of the stock, decreed in favor of the complainant; enjoined the defendant from bringing any action against the company; directed him to execute a release, and declared the agreement entered into between the company and the defendant void. Whereupon Jones, the defendant below, appealed. No question was made, on the examination below, as to Bolles still holding his stock.

Mr. M. H. CARPENTER, for the appellant.

I. The whole of the complainant's case rests, as regards merits, upon loose verbal alleged admissions, made under circumstances of all others most likely to be misunderstood or misconstrued. They are susceptible of precisely the explanation given by the defendant; his explanation carries upon its face evidence of its truth. The attempt is to hold a party responsible for general conversation held at a kind of social party; that conversation relating to real estate, the title of which might have been fully understood by the examination of an abstract which was publicly exhibited. Can this be done?

II. But there are difficulties as to jurisdiction and pleading.

The basis of the prayer for relief is, that Jones threatens to bring a suit against his co-defendant, the mining company, upon a false and fraudulent claim, and that thereby the complainant is liable to suffer injury and sustain damage, and one of the defendants, the company, is liable to be greatly embarrassed in conducting its affairs. Assume all this to be true, then,

1st. If Jones made false representations whereby the complainant was induced to purchase stock and was injured, the courts of common law afford an ample remedy. If he made true representations and afterward attempted to do that which, if consummated, would operate as a fraud upon the

complainant, the courts of law still afford a remedy. If his representations operated as an estoppel against his setting up a claim against the company, it would be as operative a defense at law as it would in equity. If the threatened action had been or were to be brought by Jones against the company, the answer would be that the claim is false, fraudulent, and brought for the purpose of extortion. This affords a perfect defense in law. If the claim were true and not false, but Jones had estopped himself from enforcing it by making false representations, that is, by representing to the purchasers that he had no claim against the company, and the contrary of those representations, if acted upon, would injure and embarrass the company, the defense is still perfect in the action at law. A court of law has thus full and adequate jurisdiction of the subject-matter of the action, whatever may be the alleged particular phase of it.

Yet further. The case stated does not constitute an equitable cause of action. It does not show wherein or how much damage the plaintiff is liable to sustain, and does not pretend that any has been sustained. Courts of equity will indeed protect against great threatened injury where the mischief will be irreparable. But there is no allegation here of irreparable injury; no averment that Jones is irresponsible; no statement of facts from which injury can be inferred. The only allegation upon that subject is that the stock which plaintiff now holds is liable to become greatly depreciated in value.

The bill is not one for discovery. All of the facts are known, and susceptible of proof without any testimony to be furnished by the answer.

2d. But how does a court of equity, on such a case as the one assumed, acquire jurisdiction? The mining company is not charged with fault or collusion. It is not alleged that if sued by Jones it will not defeat the action, nor that it is incapable of transacting its own business, and protecting its stockholders; nor is it shown how stockholders so large as the complainant and his associates, have not a sufficient control of the affairs of the company; nor that the company could not have brought an action in its own State court to remove a cloud upon its title, if it was likely to be embarrassed by Jones set-

ting up a false and fraudulent claim. If, then, there is no collusion, or concert of action, charged between the defendants, and relief be demanded against both or all in regard to the same thing, and no cause of action be stated against one, there is a misjoinder of parties as to both or all, and, of course, either may demur.

3d. The proof does not show that the complainant, Bolles, is the owner of any stock in the Mineral Point Mining Company. He avoids saying specifically that he owns any stock, or that he owned any at the time of filing the bill. No stockholder has united with him in prosecuting this action. If it be true that he owns one share, worth perhaps $5, he occupies the position of obtaining an injunction to restrain the company from paying an honest debt, of which his distributive share, if it were paid by an assessment, might be less then five cents.

No opposing counsel.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court as follows:

We have examined the proofs in the cause and find them to be very full and convincing against the appellant, and are satisfied with the decree of the circuit court, unless the same be invalid for some jurisdictional or technical reason.

It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against parties is the annulment of it. This can not be decreed by a court of law, but can by a court of equity.

It is next objected that there is a misjoinder of defendants by reason of making the mining company a party. But the company is directly interested, and though no relief is prayed against it, but rather in its favor, it is eminently proper that it should be made a party complainant or defendant. It could

not be made complainant against its will, and besides, its own agents joined in the fraudulent representations that were made. As a separate and independent personality, therefore, distinct from the stockholder interest, there was propriety in making it a party defendant.

It is also objected that the appellee, Bolles, does not distinctly state or prove the amount of his interest in the company. The bill expressly states that the appellee purchased, on his own account and in trust for other parties, a large number of shares, and paid therefor upward of $25,000; and then afterward states that the appellant threatened to bring an action against the company to enforce his pretended claim for rents and purchase money, whereby the stock of the company, which the appellee alleges he purchased in good faith, and which he still held, was liable to become greatly depreciated in value. This is surely an allegation of a large interest, and the statement is nowhere denied in the answer.

The appellant avers only his ignorance on the subject. But the allegation is fully corroborated by the proof, at least so far forth as relates to the purchase of stock by the appellee. No question was made on the examination as to his still holding the stock.

We do not perceive any legal grounds of objection to the decree, and it is therefore *Affirmed.*

WILLIAM H. STEVENS ET AL. v. WILLIAMS ET AL.

([1] United States Circuit Court, District of Colorado, 1879.)

[1] **Injunction must be based on suit to test title.** Equity will restrain a trespass against a mine, but unless there is some special ground for relief in equity, the title to the estate must be settled at law. Regularly the law action should be brought first, but the rule is so far relaxed that the working of the mine and the removal of ore may be enjoined upon the plaintiff undertaking to bring an action for possession, and to prosecute it with diligence.

Practice in U. S. Courts, how regulated—Mandatory injunction. The jurisdiction and practice in equity of Circuit Courts of the U. S. is regulated by acts of Congress and the rules of the Supreme Court, and is not affected by State legislation. The statute authorizing courts of

[1] Ejectment between same parties: 1 M. R. 557, 566.

[2] *Old Telegraph Co.* v. *Central Co.*, 1 Utah, 331; *Post* INJUNCTION.

equity to restore possession where parties have been ousted by force is therefore inoperative upon the federal courts.

Bill for an injunction and to obtain possession of the Iron mine in Lake county.

G. G. SYMES, for plaintiffs.

L. J. LAWS, for defendants.

HALLETT, D. J.

Plaintiffs own the Iron lode by patent from the government, dated Dec. 31, 1877. They allege that the vein crops out within the territory covered by the patent, which is in the usual form, 1,500 feet in length by 300 feet in width. Beginning at the top or apex of the lode, within their own territory, they sunk a shaft or incline on the vein a distance of about 475 feet, and as the vein has an inclination of only 15 degrees from the plane of the horizon, in going that distance they went some 325 feet beyond their own lines. They allege that they found silver-bearing ore three to six feet thick, with well defined walls throughout the whole distance, except for the first 15 feet from the surface, and that the vein may be easily traced so far as it has been explored. From the entrance to plaintiffs' incline eastward in the direction of the dip of the vein, a hill rises in about the same degree as the vein descends, so that the surface of the earth and the vein form an angle of only 30 degrees. From the surface of this hill, at a point about 400 feet east of the mouth of plaintiffs' incline, defendants sunk a shaft 185 feet through country rock, broke into plaintiffs' incline at a point about 75 feet from the bottom thereof, drove out plaintiffs' men with force and arms and erected a barricade to prevent them from returning. Having so unlawfully taken and secured possession of the lower part of plaintiffs' incline, defendants proceeded to mine and take away the valuable ore there found. Upon these facts, alleged in the bill, and in several affidavits filed therewith, plaintiffs ask that they may be restored to the possession of the mine, as provided in a statute of the State, and that defendants may be enjoined from working the property.

Defendants have answered without oath, denying nearly all of the bill, but admitting the entry into plaintiffs' incline and the erection of the barricade, and saying that it was done with-

out force or violence. They have also filed a cross-bill, in which they set up an adverse claim to the premises under a location made after the Iron lode was patented. From the answer and cross-bill it seems that the defendants claim the body of ore in controversy as separate and distinct from the iron vein, or perhaps that plaintiffs' patent does not cover any vein whatever. At all events, defendants claim that the body of ore is subject to location on the surface of the ground, and plaintiffs contend that it is a part of the Iron vein which crops out in their territory 300 feet or more distant, and so within the terms of the grant to them: R. S., Sec. 3,322.

Aside from the peculiar character of the ore body described in the bill, of which we are not now sufficiently advised, the case is like many others that have arisen in this jurisdiction in which two parties claim the same deposit under different locations. The course of proceeding in all such cases has been tolerably well marked out by decisions of courts, and yet in almost every case that arises doubts are expressed as to the nature and extent of equitable jurisdiction in such matters, and counsel evince a disposition to discuss the whole subject from beginning to end. To save much labor, it may be well to state, in a form which may be preserved for reference, some of the rules which are supposed to be applicable to such cases. The first of these is that rule which of late has come into great favor with the courts, that equity will restrain a trespass against a mine. Of course the plaintiff must show his right, and the damage impending must be considerable, but the facts appearing to the satisfaction of the court, the proposition that a trespass to a mine may be enjoined in equity is now fully accepted, and the action of the court does not depend entirely upon the ability of the defendant to respond in damages. That may be a circumstance of weight in a doubtful case, but where the facts are clear, no one but the owner of a mine should be permitted to work it against his will. So much depends upon the way in which the work of a mine is done, as whether the shafts and other openings are properly made and secured, whether the whole or only the richest part of the ore is removed, whether the water is taken out, and the like, that this kind of property is excepted from the general rule as to the injunctions in cases of trespass. So also it is

said that taking away the ore is a destruction of the estate, and in an action at law for such a trespass there seems to be a difficulty in estimating the damages. Whatever the foundation of the rule may be, it seems to be firmly established, and we have now only to inquire how far it extends. And here it is contended that having a jurisdiction to restrain the trespass, the court may proceed to the investigation of all other questions concerning the estate.

But it is plain that the jurisdiction to restrain trespasses, like that to restrain nuisances, is not an original jurisdiction of the court of equity, which enables this court, under the semblance of preventing irreparable injury to a legal estate, to take a jurisdiction of deciding conclusively upon the legal title itself: *Irwin* v. *Davidson*, 3 Iredell's Eq. 311. In the case stated in the pleadings, there is nothing like a ground of equitable jurisdiction in respect to the title to the estate. All the matters set up affecting that title are of legal cognizance, in which the parties have a constitutional right to trial by jury: *Hipp* v. *Babin*, 19 How. 271; *Lewis* v. *Cocks*, 23 Wall. 466.

To draw the question of title into this court upon a merely collateral matter, such as the preservation of the property pending the litigation, would be an usurpation of authority. If there were any equitable circumstance affecting the title itself, upon which the jurisdiction of the court could rest, the principle invoked would apply. But here we can only supplement the law by preserving the property until the controversy shall be ended. It was suggested in argument that we could easily frame a writ prohibitory in terms and mandatory in effect, like that adopted by Lord Eldon in 10 Vesey, 192, which would afford the relief desired without violating any rule of equity. As to the method of proceeding by which the court pretends to say one thing intending another, I doubt whether it is worthy of adoption. The law, which will not countenance any shift or subterfuge in others, should not resort to any in dealing with suitors. But, not to make too fine a point, it is enough to say that the practice is not of general application in equity, and can not be used to enlarge the jurisdiction. For instance, it would be easy to say in an action of assumpsit that the defendant shall not continue to withhold

from the plaintiff his damages, instead of the usual form, that the plaintiff have and recover his damages from the defendant, but no one would contend that the first would be more in the nature of a decree in equity than the second, or that by such verbal quibbling a court of equity could acquire jurisdiction of such an action. Another rule to be observed in this class of cases, then, is that unless there be some special ground for relief in equity the title to the estate must be settled at law, and a court of equity will not enter on that question.

Regularly the law action should be brought before application is made for an injunction, and that fact should be averred in the bill; but where that has been omitted through mistake or inadvertence, the rule has been, so far, relaxed to admit of the bringing of such suit after the filing of the bill, the plaintiff being put upon terms of commencing the suit within a short time and prosecuting it with diligence. With respect to the nature of the law action, if the premises are held adversely, it should be to recover the possession, as that will most certainly raise the issue of title. But if the injury proceeds from occasional trespasses, the wrong-doer not continuing in possession, it may be sufficient to bring what before the recent change of procedure would have been called trespass *quare clausum*. But this form of action should not be used when the facts will support ejectment, for the equity court will make the settlement of the title at law a condition to its action. Of course, all that has been said is with reference to cases in which a judgment at law respecting the title has not been obtained. Where the title has been settled the court will not hesitate on a proper showing to protect the legal estate.

Of the statutes of the State upon which the bill seems to be based, and which provides for a mandatory injunction to restore the possession of mining property to one who has been violently dispossessed, it is only necessary to say that it has no force or effect in the federal courts. Our jurisdiction and practice in equity is regulated by the acts of Congress and the rules of the Supreme Court, and is not affected by State legislation: *Boyle* v. *Zachare*, 6 Pet. 648; Payne v. Hook, 7 Wall. 425.

If the State legislature could confer on this court jurisdiction in an action of forcible entry and detainer, they might

take away some of the jurisdiction we have, which can not be admitted. This question, however, requires no discussion, as it is fully settled in the decisions of the Supreme Court.

For that purpose the bill can not be entertained, but as there is a prayer for a restrictive injunction also, we may forbid the working of the mine and the removal of ore, if that is desired, upon the plaintiffs' undertaking to bring an action for possession, and to prosecute it with diligence.

STUART, BUCHANAN & CO. v. WHITE ET AL.

MITCHELL ET AL. v. MCCALL ET AL.

(25 Grattan, 300. Court of Appeals of Virginia, 1874.)

[1] **Account not allowed on bill for injunction.** On bill filed by the assignees of lessees of salt works to enjoin part owners of it from disturbing their possession, the only issue is the right to an injunction and an account of profits can not be decreed.

Practice, where cases joined. But there being another case in the same court between the owners of the property, in which the court had taken possession of the property and rented it out, and both cases having been heard together, the order to account may be made in both cases.

[2] **Compulsory production of books to ascertain rental value.** An order to produce books and papers showing the amount of sub-rents received by defendants and the amount of salt manufactured, is a proper process toward ascertaining the rental value of the premises in controversy.

Salt supply of Confederate States. The enormous demand for salt in the Confederate States during the war, caused by the blockade, considered as increasing the rental value of salines during that period.

King's salt works, situated in the county of Washington, being owned by a great many persons having different interests, a bill was filed in the circuit court of that county by John D. Mitchell and others, part owners of the property, asking the court to appoint a receiver for its management; and by a decree made in the cause on the 16th of October, 1850, the court appointed a commissioner and directed him to rent out the property upon the terms and in the manner stated in the decree.

[1] *Contra*, *Ackerman* v. *Hartley*, 1 M. R. 74.

[2] *Taylor* v. *Rundell*, 11 Sim. 391.

Under this decree the property was rented for five years, commencing the first day of June, 1851, at $16,000 a year. In November, 1855, another commissioner was appointed and directed to rent out the property at public auction, for five years from the 1st of January, 1856, at not less than the sum of $20,000. At this renting Thomas L. Preston, who was the owner of Preston's salt works, which lay within a few hundred yards of King's, in which he also had an interest, rented the property at $22,000 a year. This lease extended to January 1, 1861. Pending this lease, Preston, in October, 1858, leased both Preston's and King's salt works to Spenser, Akerman & Co. for ten years, commencing the 1st of January, 1859, at the price of $50,000 a year, of which $30,000 was the price of Preston's and $20,000 the price of King's property. This lease was subsequently transferred to Stuart, Buchanan & Co. It seems that all the owners of King's salt works, except those claiming under James White, deceased, approved the lease made by Preston to Spenser, Akerman & Co., at the time, or they were subsequently satisfied.

The court did not afterward direct another lease of the King salt works; but Stuart, Buchanan & Co. continued in possession of it after the lease to Preston had expired. In this state of things Newton K. White, owning an interest in the property as one of the sons and devisees of James White, deceased, entered upon the property and, in connection with James S. Kelly and William Roberts, commenced to manufacture salt. Stuart, Buchanan & Co. thereupon applied by bill to the judge of the Circuit Court of Washington county for an injunction to restrain them. The injunction was granted, but upon the hearing it was dissolved. And thereupon Stuart, Buchanan & Co. obtained an appeal to the District Court of Appeals at Abingdon; and on the 23d of July 1867, that court reversed the decree of the circuit court.

The decree of the special court of appeals and the subsequent proceedings in the two cases are set out in the opinion of this court.

The appeal in this case is from an order entered on the 17th of April, 1872, and was obtained by Stuart, Buchanan & Co.

JOHN W. JOHNSTON, TERRY & PIERCE, for the appellants.

J. W. & J. R. SHEFFEY, J. A. CAMPBELL, and J. T. CAMPBELL, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The decree of the District Court at Abingdon, entered in the first named cause on the twenty-third day of July, 1867, not having been appealed from, must be taken as a final and conclusive adjudication of all the questions settled by that decree.

The following extract is taken from that decree:

"The court is further of opinion that as the possession of this property (the King salt works) was obtained by the appellants, or those under whom they claim, in the beginning of the year 1859, under a lease of previous date, from Thomas L. Preston, to whom, with the approval of said court, the same had been rented by its commissioner for a term of years, which did not expire until the first day of January, 1861, the appellants, or those under whom they claim, did acquire a lawful possession of said property under the authority of said court; and, although without any express authority from it, they have held over, still that it would defeat the purpose of said court, as indicated in its said decree, to tolerate any entry upon the said possession by any one of the part owners to the exclusion of the others, and that the interests of all make it necessary that the management assumed by the said court shall not be interfered with, but kept under its complete supervision and control." * * *

"That the said Circuit Court of Washington county, having by its decree assumed the management of said property, alone can determine whether to confine the lease for ten years, made by Preston to Spenser, Akerman & Co., of whom the appellants claim to be legal successors, or to treat them as being in the possession of the property under the terms of the lease to said Preston; or to hold them responsible for such other reasonable rent as said court may determine to be right; or it may determine that the interests of the several owners may be promoted by a new letting of the property on such terms as it may seem proper; but these questions can only be properly determined by that court in some proceedings to

which all the part owners are parties. It is therefore the opinion of this court that the injunction awarded in this cause, instead of being dissolved, should have been continued; that the appellants should have been required to amend their bill by making all the owners of the King salt works parties thereto; and that the cause, when heard, should have been heard with the before-mentioned suit of *Mitchell and others* v. *McCall and others*."

Under this decree of the district court, and in accordance with its directions, the Circuit Court of Wythe, on the 3d day of May, 1870, entered a decree declaring that "the complainants be required to amend their bill by making all the owners of the King salt works parties thereto, and with a view of conforming to the requirements of said decree, that the cause when heard should be heard with the case of *John D. Mitchell and others* v. *A. McCall and others*. Depending in the Washington Circuit Court, this cause is, by consent of parties, removed to the Circuit Court of Washington county for the purpose aforesaid, without being remanded to rules."

Afterward, it appearing to the court that the plaintiffs in the injunction suit had in some mode adjusted the matter of rents of said salt works with the other owners, except the heirs of James White, an amended bill was filed making said heirs parties defendants; and this was accepted as a compliance with the order of the district court respecting new parties.

At the April term, 1871, of the Circuit Court of Washington, a decree was entered, directing its commissioner "to take, settle, and adjust an account, showing what would be a reasonable rent of King's salt works, in the hands of the plaintiffs, due to defendants or any of them, from the first day of January, 1861, to the first day of January, 1869, with interest thereon, and any payments, if any, made by Stuart, Buchanan & Co. to the defendants, or either of them, during said period, on account of rents of said salt works;" and the decree required the complainants "to produce before said commissioner any books, accounts, and papers in their possession he may require, to enable him to ascertain a reasonable rent of the property during the said period."

Under this decree the commissioner proceeded to take evidence, and gave notice to the plaintiffs to produce before him

at his office at Abingdon, "all their books, papers and accounts relating in any manner to the business of manufacturing salt at Saltville, during the period embraced in the order settling said account, and the proceeds of sales from the same, during the same time, in order that a full and accurate account of the entire operations may be ascertained and fully set out." After this notice had been served on the plaintiffs they filed their petition to the Circuit Court of Washington county, setting out the above requirement of the commissioner, and complaining that the order of the court, with the action of the commissioner under it, was calculated "to be productive of great wrong and injustice, and if proceeded in will occasion great expense and delay;" that according to the requisition of the commissioner they would be subjected to the delay and expense of interminable accounts of very large transactions of many years, and that the time, labor and money wasted in taking these accounts could hardly be estimated. They conclude their petition by referring to the order of the court, and saying, according to this plan (of the commissioner) every shipment and sale of salt will have to be inquired into; testimony will have to be taken over most of the Southern States; an interminable sealing of money received and money paid out from month to month will be necessary. And to make such a plan still more difficult, it will be found that many of the heaviest salt transactions of your petitioners are still unsettled, and many are now the subjects of litigation in various parts of the country."

This petition was received and considered by the circuit court, and in a careful and clear written opinion filed with the record, he proceeds to construe the legal effect and terms of the order of April 3d, 1871, and to prescribe and limit the action of the commissioner under it. His Honor, Judge KELLY, after noticing at length the objections raised in the petition, says: "He (the commissioner) ought to confine his inquiries solely to what would be a reasonable rent of King's salt works, in the hands of complainants, from the first of January, 1861, to the first of January, 1869, and the payments made by them on account of rents to defendants, and not to an account of the entire operations of complainants in the manufacture of salt. If the commissioner deems it proper

in the first instance, to call upon complainants for the production of documents, he should restrict his call to such books, papers and accounts as pertain to the rental value of the King salt works, and to any payment of rents to defendants. The complainants will then, under oath, produce such and such only of their books, etc., as in their judgment are relevant to the inquiry and account required by the commissioner. Should the commissioner not be satisfied with this production, and, in his discretion, order a further production, he will designate what other documents are to be produced. If the defendants are advised that the documents are not relevant, or that they are such as they are not bound to produce, they (at the risk of being regarded as in contempt should the court decide that the books, etc., should be produced) will decline to produce them, and upon the commissioner's certificate of refusal the question will come before the court." And it was thereupon ordered that Commissioner Leonidas Baugh do reform his requisition for the production of books, papers and accounts by the complainants, so as to require only the production of such as relate to or will aid him in ascertaining the rental value of the King salt works from the first day of January, 1861, to the first day of January, 1869.

These proceedings were held in vacation, and Commissioner Baugh afterward made a report showing "his efforts to take the account ordered, and the failure of Stuart, Buchanan & Co. to produce before him the books, accounts and contracts required by him as necessary to enable him to take said account, and report such reasonable rent and payments, if any, thereon, as required."

At the April term, 1872, the circuit court, after referring in its decree to the proceedings in vacation above noticed, the instruction to Commissioner Baugh, restricting his inquiries to ascertain what would be a fair rental value of the King salt works, and limiting his requisition for books, etc., to such only as may be necessary to aid him in reaching that inquiry, and after setting forth the decree of the District Court of Appeals, which declared that the Circuit Court of Washington county should determine either "to confirm the lease for ten years, made by Preston to Spenser, Akerman & Co., of whom Stuart, Buchanan & Co. claim to be the legal successors, or

to treat them as being in possession of the property under the terms of the lease to said Preston, or to hold them responsible for such other reasonable rent as said circuit court may determine to be right," entered the following decree: "On consideration whereof, the court is of opinion and doth determine to ascertain what would be a reasonable rent, under the circumstances, for King's salt works in the hands of the complainants due to the defendants from 1st January, 1861, to 1st January, 1869, and what payments, if any, had been made by said complainants to the said defendants on account of rents during said period, and to hold Stuart, Buchanan & Co. responsible to the said defendants for their shares of such reasonable rents of King's salt works during said period, when ascertained, subject to such payments, if any; and for this purpose the court doth review and enlarge the order of account heretofore made by decree in the first mentioned case to be taken by Commissioner Baugh, and to enable him to take it, said Stuart, Buchanan & Co. are ordered to produce before said commissioner on oath, when required by him, all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under such contract. * * * And said commissioner is required, from such evidence as the parties may produce before him, to ascertain and report a reasonable rent for said King's salt works, and of the shares of said defendants therein during said period, and report the same to the court with any matter specially stated, deemed pertinent by himself, or required by either of the parties to be stated."

It is from this decree that an appeal has been allowed to this court.

The court is of opinion that there is no error in the decree complained of. It is in entire conformity with the decree of the District Court of Appeals at Abingdon, which not being appealed from, must be taken as a final adjudication of the questions stated by that decree. Under that decree the Circuit Court of Washington was empowered and directed to hold the appellants responsible, either for the amount of the lease made by Preston to Spenser, Akerman & Co., or the

amount of the court's lease to Preston, or for such other reasonable rent as said circuit court may determine to be right. It was to ascertain what is a reasonable rent that the matter was referred to a commissioner for inquiry. It was a proper mode, and the best mode of ascertaining the rental value. Nor is the decree of the court subject to the objection that it is a decree for an account of the profits, and indicates a purpose to hold the appellants responsible for, and to give the appellees a share in the profits made during the period for which the salt works were held by the appellants; on the contrary, both the instructions given to the commissioner and the decree of the court expressly limit the inquiry to what would be a reasonable rent; and he is directed to call for the production of such books and papers and contracts of lease with sub-tenants, and such only, as will enable the commissioner and the court to make a correct estimate of the fair rental value.

The decree appealed from, directs the production by the appellants of all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and all books and accounts and papers in their possession or power, showing the quantity of salt manufactured during said period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under such contract.

There is nothing unreasonable or oppressive in this order, and it is difficult to perceive upon what reasonable grounds the appellants can object to it. They knew when they took possession of the King salt works, under the lease of Preston to Spenser, Akerman & Co., that this property was under the supervision and control of the Circuit Court of Washington county, and that the yearly rent had been fixed by the court for many years past. They had sub-let a large portion of the property to sub-tenants, and during the period indicated in the decree had received from them large rents in manufactured salt and otherwise for the privileges granted. Surely it was a legitimate inquiry, in order to arrive at a reasonable rent which the appellants should be required to pay, to ascertain what rent they received from their sub-lessees during the same period.

Nor is the objection well taken, so earnestly insisted upon by the learned counsel for the appellants, that under the issue made by the pleadings in the suit of *Stuart, Buchanan & Co.* v. *White and others*, no account could be ordered by the court. That objection to the decree would have been potent and conclusive if the action of the court had been confined to that case; for the only issue made by the pleadings in that case was whether the King heirs had a right to enter and use the property for themselves. But under the decree of the district court, the circuit court was directed to hear, together with the suit of *Stuart, Buchanan & Co.* v. *White*, the suit of *Mitchell* v. *McCall*, after bringing before the court, by an amended bill, all the King heirs. In the last named case, the Circuit Court of Washington had assumed, without objection, and with the approval and at the request of all the parties interested, the complete supervision and control of the property, renting it out, and distributing the rents among the parties entitled. It required, therefore, no issue in the pleadings in the suit of *Stuart, Buchanan & Co.*, to enable the court to do that which, for years, it had done under full authority in the suit of *Mitchell* v. *McCall*, to wit, to ascertain the reasonable rent for the King salt works, and distribute that rent so ascertained, among the parties entitled to receive it. Under proper proceedings in that suit, Preston had leased the property for five years from the court's commissioner. In 1859 he made a lease to Spenser, Akerman & Co., and the latter to Stuart, Buchanan & Co. Stuart, Buchanan & Co. took the place of Preston, whose lease expired in January, 1861; they held over without any authority of the court and without any new contract with the court. It was certainly the right of the King heirs to demand, and the duty of the court, which had the supervision and control of the property, to compel, the payment of a reasonable rent. The proceedings complained of were taken simply for the purpose of enabling the court to ascertain and fix what amount would be a reasonable rent; it had no authority to do this, by the express terms of the decree of the district court, which not being appealed from, as already observed, was final and conclusive. That decree, so far from limiting the inquiry of the circuit court to the rent which had been received under

the Preston lease, or to the amount for which Preston had ceased the works to Spenser, Akerman & Co., as the only basis of fixing the rent to be paid by Stuart, Buchanan & Co., on the contrary, left it to the circuit court to ascertain what, under all the circumstances, would be a reasonable rent for the property during the period when it was in their hands—from January, 1861, to January, 1869.

It must be remembered that during a large part of this period, an extraordinary and unprecedented demand for salt, combined with great scarcity of that article of primest necessity, not only put up the prices to enormous figures, but taxed the fullest capacity of these works to meet the pressing demand. A stupendous war and an effectual blockade, which hermetically sealed almost every port on the Southern coast, gave to the owners and lessees of the salt works of southwestern Virginia almost an exclusive monopoly in the manufacture of salt. They not only supplied the people of this State and of many of the Southern States, but they had contracts with the government of the Confederate States, of the State of Virginia, of some of the Southern States, and with many of the counties of this State. Motives of patriotism, as well as motives of gain, impelled them to work the property to its utmost capacity—if need be, to utter exhaustion. They not only made such use of the property as was never made or could be made by previous lessees, but they had numerous sub-tenants and others to whom they sold the privilege of making salt. It may well be that lessees who hold the property under these circumstances should be held to a different measure of responsibility from those who preceded them, and surely it would be no error in the circuit court to conclude that what would be a reasonable rent in times of peace when the demand for salt was ordinary and the prices usual, would not be a reasonable rent in times of war and blockade, when the demand was so extraordinary, and the prices ranging so high as to stimulate the lessees to work the property even to exhaustion. It is for the circuit court, acting in conformity with the decree of the district court, to ascertain what, under all the circumstances would be a reasonable rent. The proceedings taken by the decree appealed from, were intended to furnish the data upon which the court may act. If, in carrying out

that decree the commissioner should put the parties to needless expense and time in producing books and papers, and taking accounts irrelevant to the inquiry he was ordered to make, the plain remedy of the appellants is to apply to the circuit court to control the commissioner within the proper limits of his inquiry. The judge of the circuit court has already shown himself prompt to do this, upon such application already made in this cause. We can not see how the appellants have been aggrieved by any injury, actual or threatened, in the decree appealed from.

It will be time enough to appeal to this court when they are held to an unjust measure of responsibility, by being required to pay an unreasonable rent.

The court is therefore of opinion that there is no error in the decree of the Circuit Court of Washington county, and that the same be affirmed.

Decree affirmed.

THE BELLE·GREENE MINING CO. v. TUGGLE.

(65 Georgia, 652. Supreme Court, 1880.)

[1] **Practice—Remedy at law.** A motion to dismiss a bill in equity because the remedy at law is complete, comes too late if made for the first time at the trial term.

Contract of purchase—Specific performance. Tuggle purchased land containing two hundred acres, less one acre reserved by the vendor. The vendor also reserved the right to all ores, minerals, etc., on the land, and the privilege of repurchasing the entire tract at a specified price upon giving twelve months notice. The B. G. M. Co. purchased the one acre and the privileges reserved by Tuggle's vendor, and began a mining business. To carry on the work it became necessary for the B. G. M. Co. to have five acres of land contiguous to its mine, but Tuggle refused to convey it unless the B. G. M. Co. would take the whole tract, which the latter agreed to do upon the terms specified in the deed to Tuggle, and thereupon took possession of the five acres. Tuggle had begun improvements which he discontinued after the agreement, and at the time specified he offered to make the conveyance, but the B. G. M. Co. failed to comply with its contract, and Tuggle brought a bill for specific performance. *Held*, that there was equity in the bill.

Parol evidence to vary written contract. Where a written contract is full and unambiguous, parol testimony will not be admitted to explain the understanding of the parties.

[1] *Derry* v. *Ross*, 1 M. R. 1.

Specific performance. Where the B. G. M. Co. agreed to purchase land and take title thereto at a future date, and thereupon entered on parcel of the tract, but failed to comply with the agreement to purchase, the right of the vendor to specific performance was not lost by the fact that he remained in possession after such failure, he holding himself in readiness to make conveyance upon compliance with the contract by the B. G. M. Co.

Equity. Practice in the Superior Court. Specific performance. Contracts. New trial. Before Judge SNEAD, Richmond Superior Court. October term, 1879.

Tuggle filed his bill against the Belle Greene Mining Company, to compel the specific performance of a contract by it to purchase certain land. The material allegations of the bill are stated in the second head-note. The main point of contest was whether the defendant was bound to buy the land, or had the privilege of buying if it so desired, and whether complainant had so conducted himself as to be entitled to specific performance. The answer is not material to an understanding of the points decided; nor is the evidence, other than the following. The contract between the company and Tuggle was as follows:

"STATE OF GEORGIA—GREENE COUNTY.

"I hereby permit the Belle Greene Mining Company, now operating in what is known as Copper Mine Tract, in said county and State, and which company is now at work on one acre, owned by said company, to extend their occupation over five acres adjoining said one acre, in order that said company may build, improve and occupy fully the said additional five acres, with the view that said company are from this date bound to pay the fixed price for the two tracts of land on which said copper mine is situated by the original deed, and by the time specified therein, namely, twelve months from this date.

"The within contract binds both the parties, that is, The Belle Greene Mining Company and the said William Tuggle.

"In witness whereof we have hereunto set our hands and seals, this 29th October, 1873.

(Signed,) "WILLIAM TUGGLE.
"W. H. WARREN,
"President Belle Greene Mining Company.

"Test, P. H. MELL, Jr."

The following is an extract from the minutes of the company:

"BELLE GREENE MINES, October 29, 1873.

"A meeting of the president and board of directors was this day held, all the members being present. Various matters regarding the general interest of the company and the progress of work at the mines were considered, and the following resolution was offered by Col. Clark, and adopted:

"Resolved, That the president at once proceed to purchase * * * (certain named articles).

"Judge William Tuggle was formally notified to-day that the company would take his one hundred and ninety-nine acres of land, and pay for the same by or before the expiration of twelve months from date of notice. The privilege was granted in writing, by Judge Tuggle, the use of five acres of ground adjoining the mines. Without further business, the meeting adjourned.

(Signed,) "W. H. WARREN, President."

Complainant's son testified that he, as agent of his father, notified the company that complainant was ready to comply with his contract, and demanded or requested compliance by company. Defendant's president promised to comply. He said the company did not have the money, and if he had the means he would pay it himself; said he hoped by the next fall to be able to meet the indebtedness.

It appeared, also, that after the twelve months expired Tuggle continued in possession of the land. He also testified to damages resulting from his ceasing to improve the place, etc. The original deed to Tuggle, and numerous letters, were in evidence.

The jury found for the complainant. Defendant moved for a new trial on the following, among other grounds:

(1.) Because the court erred in refusing to dismiss said bill on defendant's motion, for want of equity.

(2.) Because the court erred in refusing to dismiss said bill upon defendant's motion, on the ground that, upon the facts alleged therein, complainant was not entitled to specific performance, and that no decree could be rendered upon the allegations therein contained.

(3.) Because the court erred in ruling out the following testimony of W. W. Clark and J. S. Hamilton:

CLARK: "Witness can not say, but thinks that the original, of which there is a copy attached (instrument of October 29, 1873), was written by him. The object of the paper was to obtain possession of a few acres of land adjoining the land in Greene county, and was notice that the Belle Greene Mining Company would be entitled to the entire tract of land on which the mine was situated by complying with the terms of the deed."

HAMILTON: "The purpose of the instrument of October 29, 1873, was to extend their occupation over five acres of land, adjoining the one acre owned by the company, in order that the said company might improve, build and occupy the additional five acres, or so much thereof as they might require for mining purposes, operatives' houses, stables, cribs, etc. I hardly know what the understanding was as to the effect of said paper by the parties signing it. On the part of the company, it was their intention not to be bound absolutely to take the land, unless the testing and developments should warrant the purchase."

CLARK: "One of the managers and acting attorney said he could draw such a paper, and it was left with him to draw."

(Other testimony concerning the understanding of the parties was also offered and rejected.)

(4.) Because the court erred in refusing to charge the jury as requested by defendant: "That if the jury believe that, upon the expiration of the twelve months named in the instrument of October 29, 1873, and the failure of defendant to pay or tender payment and demand a deed to the land, that the complainant treated said instrument as not further binding on him, and continued to occupy and rent the land as his own, then there can be no recovery by complainant in the action."

The motion was overruled and defendant excepted.

H. CLAY FOSTER, for plaintiff in error.

J. C. C. BLACK, for defendant.

JACKSON, Chief Justice.

1. The motion to dismiss the bill because the remedy at law was complete was made at the trial term, and came too late. To oust equity of jurisdiction on this ground and turn the complainant over to law, a demurrer must be filed at the appearance term: 60 Ga. 627; 61 Ga. 33.

2. But there is equity in this bill. Certain improvements contemplated and commenced by the complainant were suspended by the contract of defendant to buy his land, and damages could not be well ascertained in money. The vendor sold part of his land on condition that the vendee would take the other part at a fixed price at the end of twelve months. The trade was one. The consideration was for the entire land contracted for. On the faith of the contract—the entire contract—the defendant got part of complainant's land valuable for mining, and then tried to get out of taking and paying for the part not so valuable for mining, but which it was constrained to agree to take in order to possess the four or five acres that the company really wanted. It seems to us to be a clear case for specific performance. The evidence is all in writing and beyond dispute. It appears in the written contract and on the minutes of the company itself, and where such is the case specific performance will be decreed by a court of equity just as certainly as damage would be awarded at law: 17 Ga. 142; 48 Id. 404: 51 Id. 47. Of course, if the law courts and remedies were adequate, and at the proper time defendant required complainant to go there without delaying him unnecessarily, there he must go and get the damage assessed; but if he be not pointed to that forum at the first term, he may abide in the court of chancery, and there will get damage if adequate and ascertainable, or a decree for specific performance if such be the more perfect remedy for his wrongs.

3. The writings are full and unambiguous, and must mean what the words written indicate, and the court will give them that meaning without regard to the understanding of the agents of one party or both parties even. Parol testimony may explain written terms when doubtful, and if those terms do not show a clear meaning, the understanding of the parties may be shown outside to ascertain the meaning; but where the contract is not cloudy but all light, it were folly to attempt to make it shine by lesser lights. Where the sun is shining gas is useless.

Therefore the court was right to reject the parol testimony of Mr. Clark and Dr. Hamilton.

4. The court was right to refuse to charge as requested even if the request had been in writing.

If defendant would not enter on and pay for the land, what was complainant to do? It would be strange to say that he forfeited the interest he had in the contract to give the other party possession on his paying for it, because when the other refused to go into possession or to pay for it, he kept it until it was paid for—offering all the time to give possession the moment the other side was ready to do its part.

5. Taking the case altogether, it strikes us as full of equity and the verdict and decree are demanded by the facts. Even if errors were made, they would not require the case to be remanded; for the result must be the same.

The president of the company would have carried out the contract individually if he could, and all sorts of promises were made to do so. There was no fraud on the part of complainant, but the trade was fairly made with all eyes open, and to such bargains all persons, artificial as well as natural, must stand.

Judgment affirmed.

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[1]BURKE v. FLOOD ET AL.

(1 Colo. L. R. 71. Superior Court of California, 1880.)

[2]**Stockholder's suit—Parties.** It is a general rule that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation, and that ordinarily it can not be brought in the name of the stockholders; but if the directors refuse to prosecute, by collusion with those who have made themselves answerable by their negligence or fraud, or if the corporation is under their control, the stockholders, who are the real parties in interest, will be permitted to bring the suit and make the corporation a defendant.

Equity will restrain acts amounting to breach of trust. Courts of equity will, at the instance of a stockholder, control a corporation and its offi-

[1] See *Burke* v. *Flood*, 1 Fed. R. 541; 6 Saw. 220.

[2] *Dannmeyer v. Coleman*, 5 M. R. 474.

cers, and restrain them from doing acts, even within the scope of the corporate authority, if such acts when done would amount to a breach of trust.

SULLIVAN, J.

This is a bill in equity, filed by John H. Burke, a stockholder in the Consolidated Virginia Mining Company, on behalf of himself and such other stockholders in said corporation as may become parties, against James C. Flood and the representatives of Wm. S. O'Brien, charging said Flood and O'Brien with the fraudulent misappropriation of stock, belonging to said corporation. The corporation is also made a defendant.

The complaint alleges that in April, 1872, the defendants, Flood and O'Brien, were partners of J. W. Mackay and J. G. Fair, and the said partnership purchased from one Geo. W. Kenney twelve and one twentieth feet of mining ground, the purchase being made through Solomon Heydenfeldt, in whose name the deed was taken.

It is claimed that the consideration paid was a sum of $1,250, and that said purchase was made by said partnership with the intent of selling the land to the corporation.

It is stated also that Flood and O'Brien, at the time of the combination formed for the purchase and sale of the land aforesaid, were trustees of said corporation, and that from that time up to the commencement of this action the other directors of said corporation were controlled by and in the interest of the defendants, Flood and O'Brien.

The consideration paid by the company is alleged to be 120½ shares of the capital stock of the corporation, the market value of which at the date of the transaction was $18,000. The plaintiff thus claims that said partners bought said property for $1,250 and sold it to the corporation, of which two of them were directors, at an advance of $16,750; that such action on the part of Flood and O'Brien was in violation of their trust as directors, and a fraud on the corporation defendant and its stockholders. The highest market value of the said 120½ shares of stock, which was reached in January, 1875, is stated to be $1,398,080. The dividends declared on the same, up to the commencement of this action, are claimed

to be upward of $600,000. The plaintiff demands that said defendants account to the said corporation for all the said stock and dividends, and that they be allowed merely the money actually expended in the purchase of said mining ground.

Three other similar circumstances are set out in the complaint, and plaintiff avers that the aggregate amount realized by the defendants on the stock issued to them at the time of the several sales to the company is $10,498,068, which sum the plaintiff prays the defendant be compelled to account for to the company.

It is alleged that demand was made on the corporation to bring this action, and that the corporation refused to sue; and it is claimed that such refusal is due to the corporate control exercised by the defendants over the present directors of the corporation.

The complaint is demurred to by all the defendants, including the corporation, on numerous grounds; but the grounds more especially relied on are the following: 1. That the complaint does not state facts sufficient for cause of action. 2. That said complaint shows no facts entitling the plaintiff to the relief, or authorizing him to maintain the action.

The general rule governing actions of this character is that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation, and that under ordinary circumstances it can not be brought in the name of the stockholders or in the name of some of them: Angell and Ames on Corporations, section 312, and the authorities there cited. That where it is claimed that the directors of a corporation refuse to prosecute, by collusion with those who have made themselves answerable by their negligence or fraud, or where the corporation is still under the control of those who must be defendants in a suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation party defendant. The reason given for this rule is that otherwise a minority of the corporation would be completely in the hands of a corporate majority, and official misconduct, malfeasance and

fraud would be encouraged and protected by the forms of law. But it was well said in the case of *Robinson* v. *Smith*[1] that courts of equity never permitted a wrong to go unredressed merely for the sake of form. The same doctrine is laid down in *Hichings* v. *Congrieve*, 4 Russell, 462.

In the case of *Hazard* v. *Durand*, 11 R. I. 206, the court says the jurisdiction does not appear to be so firmly settled and defined in England as in this country, but we do not believe that any English judge has ever decided that a president or director who fraudulently diverts or embezzles corporate funds can not be sued in equity by a stockholder when the corporation wilfully neglects or refuses to bring the suit. Indeed, to hold that a corporation could gratuitously condone or release such a fraud by anything short of unanimous consent, would be monstrous. It would be in effect to hold that a president or director who can control a majority vote in the corporation may rob or despoil with impunity. There are numerous American cases which hold that in such circumstances a stockholder may sue for himself and other stockholders, making the corporation a co-defendant with the guilty parties: See *Verplanck* v. *Mercantile Insurance Co.*, 1 Edward Ch. Rep. 84; *Cunningham* v. *Pell*, 5 Paige, 607; *Hodges* v. *New England Screw Co.*, 1 R. I. 312; *Speering's Appeal*, 60 Penn. St. Rep. 199.

Some authorities controvert the doctrine here laid down, notably so in the case of the *United States* v. *The Union Pacific Railroad*, 98 U. S. 599. These cases lay down the doctrine that while a stockholder may maintain an action individually against the guilty parties, he has no right to represent the corporation, and to bring it unwillingly into court to conduct a litigation for the purpose of recovering its property from its faithless officers. How this relief could be effectually administered without an accounting, I can not readily see. At all events the vast preponderance of authority of fundamental equity jurisprudence sustains the rule above laid down.

The doctrine laid down in *Robinson* v. *Smith*, cited above, is approved in the case of *Neall* v. *Hill*, 16 Cal. 151, and *Wright* v. *The Oroville Mining Co.*, 40 Cal. 20. In the latter case, WALLACE, Justice, uses this language: "But the court

[1] 3 M. R. 448.

of equity in dealing with the relations between the corporation and its officers upon the one hand, and the stockholders upon the other, in the management of the corporate affairs, look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders. The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted at least with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. And it is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts when done would, under the particular circumstances, amount to a breach of the very trust upon which as we have seen, the authority itself has been conferred. And upon the same principle, the court will, even after such an act has been done, relieve an injured stockholder from loss, if, in the mean time, no superior equity has intervened, nor the rights of innocent third parties attached." See also *Rogers* v. *Lafayette Agricultural Works*, 52 Ind. 305; *Cogswell* v. *Bull*, 39 Cal. 324; *Parrott* v. *Byers*, 40 Cal. 625; *Greeves* v. *Gouye*, 56 How. Prac. 272. The plaintiff has standing therefore, and has the capacity to maintain an action in a proper case.

Does this complaint show a case in which the defendants should be called upon to answer? In the light of the decisions in California and elsewhere, I think it does: *San Diego* v. *San Diego & Los Angeles Railroad*, 44 Cal. 112; *Wilbur* v. *Lynde*, 49 Cal. 292; *Farmers and Mechanics Bank of Los Angeles* v. *Downey*, 53 Cal. 466.

Defendants claim that the bill shows an acquiescence in, and ratification of the alleged fraudulent acts. I do not think that such appears on the face of the complaint, and the court is not allowed otherwise to presume it.

In the separate demurrer of the executors of O'Brien, it is urged that plaintiff can not maintain the action, because an allegation is made of presentment of the claim to the executor of O'Brien, deceased.

Section 1493 of the Code of Civil Procedure, is relied on in

support of this position. That section refers by its terms to claims arising on contract, and does not extend to claims founded on tort. It does not embrace the right to file a bill in equity to obtain an accounting: *Lathrop* v. *Bampton*, 31 Cal. 24; see also *Gunter* v. *Janes*, 9 Cal. 643.

From these views it follows, in my judgment, that the demurrer should be overruled, and it is so ordered.

Twenty days will be allowed to answer.

DANNMEYER v. COLEMAN ET AL.

(11 Fed. Rep. 97. 8 Saw. 51, U. S. Circuit Court, Dist. of California, 1882.)

[1]**Stockholders' suit—Necessary allegations.** A stockholder who brings a suit on his own behalf and on that of the other stockholders, to vindicate the rights of the corporation and for an accounting, must not only state the grievances which call for this kind of relief, but show to the court that he has exhausted all the means within his reach to obtain redress within the corporation itself, or by the stockholders as a body.

Idem—Bona fide interest essential. He must show that he has made such an effort himself, and not that another has; that he was a stockholder at the time of the transaction of which he complains, or that the stock has devolved on him not by purchase, but by operation of law; and that the suit is not a collusive one to confer jurisdiction on the federal court; and the bill must be verified.

Averments necessary in bill to avoid bar of statute. A statute provided that an action for relief on the ground of fraud must be brought within three years, the cause of action not being deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. *Held*, that upon suit for acts performed more than three years before, the bill must aver that the facts constituting the fraud were not discovered till within three years.

Jurisdiction—Multiplicity of suits. Questions relating to an ouster, jurisdiction arising from a misjoinder of parties, and of the right of each stockholder to institute a suit, suggested but not decided.

H. G. SIEBERST, for complainant.

HALL MCALLISTER and GEO. R. WELLS, for certain defendants.

S. HEYDENFELDT, for Consolidated Virginia Mining Company.

SAWYER, C. J.

[1] *Foote* v. *Cunard Co.*, 17 Fed. 46; *Burke* v. *Flood*, 5 M R. 469.

The complainant, a citizen of Germany, and the owner of 100 of the 540,000 shares of the capital stock of the Consolidated Virginia Mining Company, a mining corporation organized under the laws of the State of California, filed his bill in equity, on his own behalf and on behalf of all other stockholders of the Consolidated Virginia Mining Company, against James V. Coleman and James C. Flood, executors of W. S. O'Brien, deceased; the Nevada Bank, John W. Mackay, James G. Fair, James C. Flood, the Pacific Mill & Mining Company, the Pacific Wood, Lumber & Flume Company, the Pacific Refinery & Bullion Exchange and the Consolidated Virginia Mining Company. The object of the bill is to obtain an accounting between the defendant, the Consolidated Virginia Mining Company, and the several other corporations, defendants, the defendants Coleman and Flood, as executors of O'Brien, and Mackay, Fair and Flood, in their individual characters as partners in the transactions set out, for large sums of money and a large amount of property, alleged to be ten millions of dollars in the aggregate, charged to have been fraudulently obtained, upon various large transactions, from the Consolidated Virginia Mining Company, by the other corporations, defendants, which are alleged to have been organized and controlled in pursuance of a conspiracy for that purpose, by the personal defendants, who also, as is alleged, owned a controlling interest in the Consolidated Virginia Mining Company, and were either the officers, or elected and controlled the officers of that corporation. The sums so fraudulently and unlawfully obtained by said several corporations from the Consolidated Virginia Mining Company are charged to have been distributed in dividends to said Flood, O'Brien, Mackay and Fair, or otherwise to have come into their hands.

The prayer of the bill is as follows: "Wherefore, your orator prays that it be by your honor adjudged and decreed that the defendants, said Flood, Mackay and Fair, and Flood and Coleman, as executors as aforesaid of the estate of said O'Brien, account to the said Consolidated Virginia Mining Company and to the stockholders thereof for all the wrongs, frauds and breaches of trust hereinbefore alleged and complained of, and on such accounting repay and restore to the

said Consolidated Virginia Mining Company, for the use of the stockholders therein, except the defendants in this action, all profits, moneys and property belonging in law and equity to said company, realized, gained or obtained by said defendants, or any of them, by means of the dealings and transactions hereinbefore set forth, together with all the proceeds and fruits thereof," and for such other and further relief as may be just.

The allegations of the bill as to the acts of defendants, are similar to those contained in the bill in *Burke* v. *Flood*, 6 Saw. 221, and it would serve no useful purpose to state them more fully now.

Mackay has not been served, and has not appeared.

The Consolidated Virginia Mining Company demurs separately to the bill on various grounds, and several of the other defendants also demur upon similar grounds.

In the recent cases of *Hawes* v. *Contra Costa Water Co.* 104 U. S. 450, and *Huntington* v. *Palmer*, Id. 482, which went up from this court and were affirmed, the United States Supreme Court states the conditions which are necessary to enable a stockholder of a corporation to bring a suit on his own behalf, and on behalf of the other shareholders, to vindicate the rights of the corporation. After stating the character of the grievances necessary to entitle the stockholder, instead of the corporation, to sue, the court says: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on its part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains."

There is no allegation whatever in this bill that the complainant has made any effort to induce the corporation, the

Consolidated Virginia Mining Company, to seek a redress for the grievances alleged. It does not appear that he ever requested the directors to sue, much less that he ever made "an earnest, not simulated, effort with the managing body of the corporation to induce remedial action on its part"; nor does it appear that "he has made an honest effort," or any effort of any kind, "to obtain action by the stockholders as a body," or even any stockholders individually; and nearly four years is certainly time enough to permit him to make such "an honest effort."

He alleges that one S. P. Dewey, a stockholder in said corporation, nearly four years before, at a regular session of the board of directors, made an application and demand that the corporation bring a suit against the said Flood, O'Brien, Mackay, and Fair, for the recovery of the same moneys, on the same grounds as alleged in this bill, but that the said directors refused to bring the suit. But the action of Mr. Dewey can not avail the complainant in this bill. He does not appear to be in privity with Dewey, or to have been in any way connected with the request. Reasons not applicable to the complainant in this bill may have existed, that would justify a refusal to act upon Dewey's request. At all events, if the complainant desires action he must himself take steps to secure it before he can acquire a *status* that will enable him to take the vindication of the rights of the corporation and other stockholders into his hands. There is nothing in the opinion of the Supreme Court to indicate that the action of a stranger to him, for that stranger's own purposes, will give complainant the requisite *status*. It does not appear who were the directors or stockholders of the Consolidated Virginia Mining Company at the time of the filing of this bill, or for three and a half years prior to that date. Had the complainant applied to the board of directors then conducting the affairs of the corporations, it may be that his request would have been effectual. At all events, we are not authorized to assume the contrary without averment, and it should at least appear that some recent honest effort has been made to secure the protection of the rights of the stockholders through the action of the corporation itself. But even Dewey does not appear to have made any honest, or any effort at all,

to obtain action by the stockholders as a body. So his action was in this respect also insufficient, within the decision, to enable him to maintain such a suit, much less the complainant.

The Supreme Court further says:

"The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity; and an allegation that complainant *was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law*, and that the suit is not a collusive one to confer on a court of the United States jurisdiction, in a case of which it would otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

There is no allegation showing any of these facts. There is no allegation "that complainant was a shareholder *at the time of the transactions of which he complains*, or that his shares have devolved on him since by operation of law." All the acts complained of occurred before the decease of O'Brien, which is alleged to have happened May 2, 1878, three years and six months before the filing of the bill. It does not appear that complainant was the owner of the stock, *or of any stock*, at or prior to that date; or when or how or for what purpose he became owner of the stock now alleged to be held by him. For aught that appears in the bill he may have purchased the stock on the day or week in which the bill was filed, with the sole design of bringing a suit for speculative or malicious purposes. It is an open, notorious, historical fact, appearing in the daily stock reports, familiar to all Californians, that at the date of the filing of this bill, and for a long time prior thereto, the stock of this corporation had but a very trifling value—less than three dollars per share. One with ideas of existing frauds, expanded to ten millions of dollars, or having a private grudge to satisfy, might very well think it a good operation to invest a few dollars in the purchase of 100 out of 540,000 shares of stock, to serve as the basis of a speculative or malicious suit. But the Supreme Court, in effect, says, in the passages quoted, that a suit on such a basis can not be entertained; that the complainant must affirmatively allege that he "was a shareholder at

the time of the transactions of which he complains, or that his shares have devolved on him since," *not by purchase*, but " *by operation of law.*" He must also show that the suit is not a collusive one, and that he has in good faith made an honest effort to induce the corporation itself to redress its own grievances, and, on failure with the corporation, has made an effort to induce the stockholders as a body to act.

Not satisfied with simply deciding these principles as questions of equity law, the Supreme Court carried them into a rule of court, which now reads as follows:

Equity Rule 94. " Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts *of the plaintiff* to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Thus, the bill must disclose the efforts of " the plaintiff," *not of others*, to secure redress in the ordinary mode. See, also, *Huntington* v. *Palmer*, affirming the case cited, 104 U. S. 483.

In view of past judicial history, both here and elsewhere, the Supreme Court, in my judgment, acted wisely in laying down the principles stated in its recent decisions, and its rule with reference to this class of bills filed by stockholders. It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex*, very properly applicable; which would be the case in this in-

stance but for the enormous, not to say astounding, amounts alleged upon information and belief only, to have been fraudulently appropriated. The bill does not contain the allegations referred to or required by these decisions and this rule; and it is, therefore, insufficient on those grounds.

The suit is also barred by lapse of time in analogy to the Statute of Limitations. In this State the Statute of Limitations applies to all causes of action, equitable as well as legal. The grounds upon which the suit is rested are fraud. The moneys and property of which an account is sought and restoration asked are alleged to have been obtained through the fraudulent conspiracy and acts of the natural persons who are defendants; and under section 338 of the Code of Civil Procedure, subd. 4, "an action for relief on the ground of fraud" must be brought within "three years"; the cause of action not to be deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud." But when it appears that the acts were performed more than three years before the commencement of the suit, a demurrer to the bill will be sustained unless it is also averred that the facts constituting the fraud were not discovered till within three years: *Sublette* v. *Tinney*, 9 Cal. 425; *Boyd* v. *Blankman*, 29 Cal. 44; *Carpentier* v. *Oakland*, 30 Cal. 444; *Broderick's Will*, 21 Wall. 518. All the acts alleged as constituting the cause of suit were acts in their nature hostile and adverse at the moment of their performance, and all of them occurred before the death of O'Brien, which is alleged to have happened on May 2, 1878, three years and six months before the filing of the bill. There is no averment of their discovery within three years. On the contrary, they are shown by the allegations of the bill to have been well known, and that Dewey made a written demand upon the board of directors, that they bring an action in the name of the corporation against the other defendants upon the same grounds as alleged in this bill, and to accomplish the same purpose. Besides, the principal facts constituting the fraud appear in the bill to be matters of public and corporate record under the statutes, of such general and public notoriety that stockholders and even strangers must have known them. If they did not, especially stockholders, who were entitled to examine the corporate records,

they must have been negligent, and careless of their own interests. The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge: *Manning* v. *San Jacinto Tin Co.* 7 Saw. 418; *Broderick's Will*, 21 Wall. 518–19; *Ashhurst's Appeal*, 60 Pa. St. 317; *Wood* v. *Carpenter*, 101 U. S. 141; *New Albany* v. *Burke*, 11 Wall. 107.

An averment, therefore, of discovery within three years, even if it had been made, it would seem, would have been futile in view of the other facts disclosed in the bill.

It is unnecessary to decide other points discussed by counsel, as more than enough to sustain the demurrers have already been determined. See *Burke* v. *Flood*, 6 Saw. 220, for a discussion of some of them. The bill, however, suggests some jurisdictional and other points which have not been made or discussed by counsel in this case, nor, so far as I am aware, in the precise form, in any other. They must sooner or later occur to counsel and be presented for adjudication, and they may as well be now suggested for consideration.

The first point made in complainant's brief is in these words: "The injuries complained of and the remedies asked being common to all the stockholders, one of them may sue, but MUST *join the others.*" A whole page of authorities is cited to sustain the point. It is doubtless intended to say, join them in the sense of suing on his own behalf and on behalf of all other stockholders. If he is right in this proposition, then the suit is not the suit alone of the stockholder who sues, but the suit of all the stockholders on whose behalf he sues. And [1] under the decision of the Supreme Court in the *Removal Cases*, in order to give the national courts jurisdiction, is it not necessary to aver, not only that the stockholder named as complainant on the record, but all of the stockholders on whose behalf he sues, are aliens? Under the decisions in those cases *all* the parties on one side must be aliens, and all on the other side citizens.

Again, the primary controversy in this case is between the Consolidated Virginia Mining Company, a California corporation, on one side, and all the other defendants on the other side. The relief sought is an accounting between the Consolidated

[1] 100 U. S. 457.

Virginia Mining Company with, and a decree in its favor against, all the other defendants. The whole main and primary controversy is between those parties.

The complainant Dannmeyer's interest as a stockholder is only secondary and derivative, and merely incidental to that of the corporation. Transferring the corporation from the side of the defendant to that of the complainant, who is simply using the corporation and litigating in his own name, and actually in behalf of the corporation and for its own benefit, as is suggested in the *Removal Cases*, should be done for the purpose of determining the question of jurisdiction; and we have an alien and a California corporation on one side, and several California corporations and citizens on the other. Does not this oust the jurisdiction?

Again, for aught that appears in the bill, all the personal defendants may be citizens of the same country with the complainant; and the bill fails to show a case of jurisdiction on that ground, as it does not appear that the controversy is between aliens on one side and citizens of the United States on the other. This particular defect might, of course, be remedied by amendment.

Another question is suggested by this case. By reference to *Burke* v. *Flood*, *supra*, it will be seen that a similar suit for these same grievances was brought by a single stockholder, Burke, on behalf of himself and *all other stockholders*. And it is a notorious, historical fact, of which the daily newspapers have been full, that these are not the only suits brought in the same way for these same grievances. Is each holder *of one* of the 540,000 shares of stock entitled to bring a suit in equity on behalf of himself and all other stockholders for an account of these same transactions? or when such a suit has been brought by one stockholder, must the others come in and seek their relief in that suit? If each stockholder is entitled to bring such a suit, then there is something wrong in the law, and the sooner the Supreme Court by rule, or Congress by statute, regulates the matter, the better it will be for the due administration of justice.

For the reasons given the demurrer must be sustained, and the bill dismissed. And it is so ordered.

1. Equity will not interfere to compel lessee to mine: *Koch & Balliet's App.*, 4 M. R. 151.

2. The remedy is at law, for breach of agreement to work quarries: *Booth* v. *Pollard*, 4 Y. & C. 61. *Post* SPECIFIC PERFORMANCE.

3. Dispute as to location of division line should be settled at law: *Fraley* v. *Peters*, 12 Bush (Ky.), 469; See *Sayer* v. *Pierce*, 1 M. R. 72.

4. There is no such privity between the owner of the minerals and the surface owner as to confer upon a court of equity such jurisdiction as it exercises over tenants in common: *Adam* v. *Briggs Iron Co.*, 7 Cush. 361; *Post* SEVERANCE.

5. To him who stands by to see the result of an adventure in mines and then assert his claims, a court of equity will lend no assistance: *Ernest* v. *Vivian*, 33 L. J. Ch. 513. *Post* LACHES.

See FRAUD; MISTAKE.

6. Objection that the subject-matter is not one of equitable jurisdiction, is waived if not taken in apt time: *Derry* v. *Ross*, 1 M. R. 1.

OUTRAM v. MOREWOOD ET AL.

(3 East, 346. Court of King's Bench, 1803.)

[1] **Former recovery in trespass.** In trespass *quare clausum fregit* for entering plaintiff's close, digging and taking away coal, defendants pleaded *liberum tenementum*, to which plaintiff replied that the premises were the same upon which he had recovered judgment in a former action of trespass against the same defendant upon a traverse of the same plea: *Held*, that such former recovery was an estoppel to the pleading of the same title by the defendant or his privies.

This was an action of trespass against the defendants, for that they with force and arms broke and entered a certain coal mine or vein of coals, lying within and under a certain close of the plaintiff called the Cow Close, or Great Cow Pasture, in the parish of Alfreton in the county of Derby, and dug out and took and carried away the coals, etc.

Pleas. 1. Not guilty; on which issue was joined. 2. That John Zouch, of Cods or Castle, in the county of Derby, Esq. (afterward Sir John Zouch, Knt.), on the 2d of November, 38th of Elizabeth, was seized in fee of the manor of Alfreton, and of divers lands and tenements in the parish of Alfreton, and that a fine was levied in the octaves of St. Martin, 39th of Elizabeth, between R. Roper and others, plaintiffs, and the said J. Zouch, deforceant, of the said manor and lands, to the use of the plaintiffs Roper and others, in fee, and a recovery was suffered of the same in M. 39 Eliz., wherein Nicholas Zouch and J. Mitchell were demandants, and Roper and others deforceants, and John Zouch, an infant, the son of the said J. Z., was vouchee, which recovery, as to the coals and ironstone within or under the said land and tenements in Alfreton parish (except the coals and ironstone within or under any of the messuages, buildings, orchards or gardens then standing and being on any of the said lands and tenements), with liberty to get and carry the same away, was declared to be to the use of the said John Zouch, the father, for eighty years, if he so long lived, remainder to the use of J. Zouch, the son, in tail male, remainder to J. Zouch, the son, in fee. That John Zouch, the father, after having been knighted, died in

[1] *Campbell* v. *Rankin*, 2 Mont. 363; *Aslin* v. *Parkin*, 1 Smith's L. C. 264.

June, 42 Eliz., and J. Zouch, the son, being so seized on the 4th of June, 15 Jac. 1, by indenture of bargain and sale duly enrolled, in consideration of £750, conveyed to Thomas Johnson, George Turner and Edmund Meymoth, in fee, all the coals, veins, mines and delphs of coals in or under the said lands, tenements or hereditaments in Alfreton, which at any time theretofore were the lands, etc., of the said Sir John Zouch, with liberty to dig, etc., and search for, get and carry away coals within the same lands, etc. (except coals within or under any of the messuages, buildings, orchards and gardens which were then standing or being upon or in any of the same lands, etc., and also except all the coals, veins, etc., in Alfreton Park, and the grounds called the New Grounds). The defendants then averred that the said coal mine or vein of coals in the declaration mentioned, at the time of the making the said indenture of bargain and sale, was part and parcel of the said coal mines, veins and delphs of coals by the said indenture so bargained and sold. That John Zouch, on the 1st of July, 15 Jac. 1, died without issue. [Then the defendants proceed to derive title to the said coals, etc., from the said Johnson, Turner and Meymoth, through various persons, down to one George Morewood, to whom the same were conveyed in fee by indentures of lease and release of the 1st and 2d of May, 1789.] The plea then stated that George Morewood afterward, on the 13th of June, 1788, duly made his will, whereby he devised all his coal mines and hereditaments, with the appurtenances, unto his wife, the defendant, Ellen Morewood, in fee, and afterward died seized on the 1st of Jan. 1791; after whose death the defendant, Ellen, became seized of the said coals, etc.; and on the 10th of February, 1793, intermarried with the other defendant, H. C. Morewood, by virtue whereof the said H. C. and Ellen became seized thereof in the right of the said Ellen. The defendants then averred that the said coal mine or vein of coals situated and being within and under the said part of the said close in which, etc., in the said declaration mentioned, at the time of the making of the aforesaid indenture mentioned to have been made by the said John Zouch as aforesaid, was not within or under any of the messuages, buildings, orchards or gardens which were or was standing or being upon or in any of the

lands, tenements or hereditaments in that indenture mentioned, nor was any part of the coals in the part in Alfreton aforesaid called Alfreton Park, or the grounds called the New Grounds, or in either or any of them. Wherefore the defendants being so seized, entered, etc., and dug out and took and carried away the coals, etc.

The replication to the special plea stated that the defendants ought not to be admitted in their plea to aver that the said coal mine or vein of coals in the declaration mentioned at the time of making the indenture of bargain and sale in the said last plea first mentioned was part and parcel of the said coal mines, veins and delphs of coals, by the said indenture bargained and sold as aforesaid, because heretofore, in Easter term, 32 Geo. 3, the plaintiff impleaded the defendant Ellen, then Ellen Morewood, widow, in a certain plea of trespass, and therein declared against her, for that the said Ellen, on the 5th of May, 1792, with force and arms broke and entered a certain coal mine or vein of coals of the plaintiff, situate and being within and under a certain part of a certain close of the plaintiff called the Cow Close or the Great Cow Pasture, in the parish of Alfreton, in the said county of Derby, and dug out of the said coal mine or vein of coals of the plaintiff large quantities of coals, etc., and took and carried away the same, etc., and that in Trinity term, 32 Geo. 3, the defendant, Ellen, defended the force, etc.; and as to the breaking and entering, etc. the said coal mine, etc., under the Cow Close, etc., pleaded that the plaintiff ought not to maintain his said action against her, because the said John Zouch, in the defendant's last plea mentioned, afterward Sir John Zouch, Knt., on the 2d of November, 38 Eliz., was seized in fee of and in the said manor of Alfreton, and divers messuages, lands and tenements in the parish of Alfreton aforesaid, in the said county, with appurtenances. And the said Ellen, in and by her said plea in the said former suit, after further setting forth (among other things) the said indenture of bargain and sale in the said last plea of the said defendants in this suit first mentioned, in manner and form as the same indenture is in that plea set forth, averred that the said coal mine or vein of coals in the declaration hereinbefore mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel

of the said coal mines, veins and delphs of coals, by the said indenture bargained and sold as aforesaid; and the said Ellen, in and by her said plea, in the said former suit, claimed to be entitled to the said coal mine or vein of coals, in the said hereinbefore recited declaration mentioned, by the same means and in manner and form as the said defendants have above, in their said last plea in this suit in that behalf, alleged; and that she, the said Ellen, was ready to verify; wherefore she prayed judgment, etc. And the said plaintiff, as to the said plea of the said Ellen in the said former suit, said that he ought not to be barred, etc.; because, protesting that the said Sir John Zouch was not seized in fee of and in the said close in the said hereinbefore recited declaration mentioned, or of or in the coals, veins, mines and delphs of coal in or under the same, or any part thereof, as by the said last mentioned plea was above supposed, he, the said plaintiff, said that the said Ellen, at the said several times when, etc., of her own wrong broke and entered the said coal mine, etc., within and under the said part of the said close of the plaintiff, called the Cow Close or the Great Cow Pasture, in the parish of Alfreton aforesaid, in the hereinbefore recited declaration mentioned and dug out of the said coal mines, etc., large quantities of coal, and took and carried away the same, etc., in manner and form as the plaintiff had above complained against her; without this, that the said coal mine or vein of coals in the said first count of the said hereinbefore recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in that plea first mentioned, was part and parcel of the said coal mines, veins and delphs of coal by the said indenture bargained and sold as aforesaid, in manner as the said Ellen had in the said plea above alleged, and this he was ready to verify; wherefore, etc., the plaintiff prayed judgment, etc. And the said Ellen, as before, said that the said coal mine or vein of coal in the said first count of the said hereinbefore recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in her said plea first mentioned, was part and parcel of the said coal mines, veins and delphs of coal, by the said indenture bargained and sold as aforesaid in manner and form as the said Ellen had in the said plea alleged, and of that she put herself upon the

country, and the said Joseph did so likewise. And such further proceedings were thereupon had, that afterward, at the assizes at Derby, on Saturday the 16th of March, in 33 Geo. 3, the said issue, so joined, etc., was tried by a jury of the county, etc., and as to the same issue, the jurors of that jury upon their oath said that the coal mine or vein of coals in the first count of the said hereinbefore recited declaration mentioned, at the time of the making of the indenture of bargain and sale first mentioned in the plea of the said Ellen in the said former suit, were not part and parcel of the said coal mines, veins and delphs of coals, by the said indenture bargained and sold in manner and form as the said Ellen had in that behalf in pleading alleged, and they assessed the plaintiff his damages 1*s.*, etc. That such further proceedings were thereupon had that the plaintiff in Trinity term, 33 Geo. 3, recovered judgment, etc., which judgment is still in force, etc. The replication then averred that the plaintiff and Ellen, the defendant named in that record, are the same parties as in this suit, and that the said coal mine or vein of coals in that record mentioned, and the said coal mine or vein of coals in the pleadings in this suit mentioned are one and the same; wherefore, the plaintiff prayed judgment if the defendant ought to be admitted against the said record to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel of the said coal mines, veins and delphs of coals, by the said indenture bargained and sold as aforesaid.

To this there was a general demurrer and joinder.

The case was very elaborately argued in Trinity term last by CLARKE in support of the demurrer, and READER, *contra;* and again in the last term by ERSKINE in support of the demurrer, and GIBBS, *contra;* but as all the principal arguments and the cases cited were noticed and commented on by the court at length in giving their judgment, the repetition of them in this place is unnecessary.

Lord ELLENBOROUGH, C. J., now delivered the judgment of the court.

This was an action of trespass for digging and getting

coals out of a coal mine, alleged by the plaintiff to be within and under his close called Cow Close. The defendants plead and show title regularly brought down to them in right of the wife by fine, recovery, bargain and sale, releases, and descents, from one Sir John Zouch, who in the 39th of Elizabeth was seized in fee of the manor of Alfreton, and of certain messuages, and lands within the manor, under which title they claim all the coals under those lands, except such as were within and under any of the messuages, buildings, orchards, and grounds, which, at the time of suffering a certain recovery, suffered in the time of Queen Elizabeth, were standing and being upon the said lands and tenements, and which coal mines, with the exception aforesaid, passed under a bargain and sale from Sir John Zouch to certain bargainees. And the defendants aver that the coals in question were under the lands of that former owner, Sir John Zouch, and were derived by bargain and sale to certain immediate bargainees, and from them to the defendant, the wife, and were not within or under any of the messuages, buildings, orchards and gardens, which are the subject of the exception. To this plea the plaintiff replies, and relies by way of estoppel upon a former verdict obtained by him in an action of trespass, brought by him against one of the defendants, Ellen, the wife of the other defendant, Henry Case Morewood, she being then sole, in which he declared for the same trespass as now, to which the wife pleaded, and derived title in the same manner as now done by her and her husband, and alleged that the coal mines in question, in the declaration mentioned, were at the time of making the before mentioned bargain and sale by Sir John Zouch, part and parcel of the coal mines by that indenture bargained and sold, upon which point, viz.: whether the coal mines claimed by the plaintiff, and mentioned in his declaration, were parcels of what passed under Zouch's bargain and sale to the persons under whom the wife claimed an issue was taken, and found for the plaintiff, and against the wife, one of the two now defendants (her husband being the other defendant with her in the present action). And the question is whether the defendants, the husband and wife, are estopped by this verdict and judgment thereupon from now averring (contrary to the title so there found against the wife), that the

coal mines now in question are parcel of the coal mines bargained and sold by the indenture above mentioned.

The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate, or in law, would be equally bound, according to what is said in Co. Lit. 352, a: "Privies in estates, as the feofee, lessee, etc.; privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law in the post, shall be bound by and take advantage of estoppels." The question then is: Is the wife herself estopped by this former finding to aver the contrary? In Brooke, tit. Estoppel, pl. 15 (who cites 33 H. 6, 7, 19, 50, and see also to same effect Bro. Estate, 158, 2, E. 4, 17) it is said to be "agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land; so that a man may plead this, as party, or as heir, as privy, or by *que estate.*" But if it be said that by the freehold coming in debate must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable, as in an assize, or writ of entry. I answer that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title; and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close (reported in 3 Leon, 194) the defendant pleaded "that heretofore he himself brought an *ejectione firmæ* against the plaintiff of the same land in which the trespass is supposed to be done, and has judgment to recover; and demanded judgment if against, etc. It was moved that the bar was not good, because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another," etc.: *Quod curia concessit.* But as to the matter, the court was clear that the bar was good. And, by PERIAM, whoever pleaded it, it was well pleaded; for as by

recovery in assize the freehold is bound, so by recovery in *ejectione firmæ* the possession is bound. And, by ANDERSON, a recovery in one *ejectione firmæ* is a bar in another; especially, as PERIAM said, if the party relieth upon the estoppel. And afterward judgment was given that the plaintiff should be barred. This, it will be recollected, was an action of *ejectione firmæ*, and not an ejectment moulded and regulated by rules of court as it is at present. The court very properly distinguished there between what operates by way of bar to a future recovery for the same thing, and what by way of estoppel. That was the case of a mere recovery in *ejectione firmæ*, without title alleged; and the plaintiff might, in respect of possession, or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is not the recovery but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them.

The authorities upon which a contrary doctrine has been endeavored to be maintained are the opinions of Lord Coke, as collected from his preface to his eighth Report; the resolution and doctrine in the case of *Ferrers* 6 Co. Rep. 7; the case of *Incledon and others* v. *Burgess*, 1 Show. 27, and S. C. Comb. 166; to which may be added what passed in court in the case of *Basset* v. *Bennett*, upon a motion for a new trial in this court in 1767; and the case of *Sir Frederick Evelyn* v. *Haynes*, Surry Summer assizes, 1782, before Lord MANSFIELD; and the decision against the estoppel endeavored to be maintained in *Kinnersley* v. *Orpe*, Doug. 517. As to the first of these supposed authorities on the subject, viz., Lord Coke's preface to the eighth Report, he there laments the muliplicity of suits in one and the same cause, whereon he says, "Oftentimes there are divers verdicts on the one side and divers on the other, and yet the plaintiff or defendant can

come to no finite end, nor can I hold the possession in quiet, though it be often tried and adjudged for either party." And he adds, "In personal actions concerning debts, goods and chattels, a recovery or bar in one action is a bar in another; and there is an end of the controversy. In real actions for freehold and inheritance, being of a higher and worthier nature, and standing upon a greater variety of titles and difficulties in law, there could not be above two trials, or at the most (and that very rarely) three; and in the mean time after one recovery the possession rested quiet." The complaint of Lord Coke is, perhaps, without much foundation, and it is certainly misapplied to the present subject. There must necessarily be a greater or less multiplicity of suits, according to the nature of the suit and the subject on which it operates. The possession of land is changed much more frequently, and the right to it is capable of an infinitely greater number of modifications and interests than the right to the freehold. The species of action accommodated to the right of possession however acquired, and to injuries in whatever manner done thereto, must be of course more frequently called into use than other species of action which respect rights of property, either founded on entails or descents from different descriptions of ancestors, and the various acts of wrong by which such special rights are interrupted or destroyed.

The judgment, which is the fruit of the action, can only follow the nature of the particular right claimed, and the injury complained of; and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same. In trespass, damages for an injury to possession are the only thing demanded by the declaration; the judgment can only give the plaintiff an ascertained right to his damages, and the means of obtaining them; it concludes nothing upon the ulterior right of possession, much less of property in the land (unless a question of that kind be raised by the plea and a traverse thereon), and does not even give him the means of obtaining that possession, for the disturbance of which he has obtained damages. Neither, however, would a verdict and judgment in a real action operate by way of bar to future actions of trespass, or bring the parties "to the finite end" wished for by Lord Coke; because

there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right, (I mean a writ of right itself,) a right of possession derived under the owner of the inheritance in fee simple, or those under whom he claims, which may enable a plaintiff in trespass to recover for an injury to his possession done by the very person in whose favor the absolute right of property shall have been so affirmed in a real action. A judgment, therefore, in each species of action, is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land, than the other. What, therefore, Lord Coke says, that in personal actions concerning debts, goods and effects (by way of distinction from other actions,) a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever *quoad* their subject-matters. And, besides, this doctrine has no material bearing on the present question, which it must be recollected is, whether an allegation on record, upon which issue has been once taken and found, is between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found.

As to *Ferrers' case*, 6 Rep. 7 (and which is to be found also reported in Cro. Eliz. 668, under the name of Sir Henry Ferrers and two others against Arden, with a statement of the facts upon which the resolutions reported by Lord Coke are founded,) it was an action of trover for an ox, brought by the plaintiffs and another person, then deceased, against the defendant, who pleaded a former recovery in trespass for the

same cause of action brought by the now plaintiffs and the deceased person, against three persons who were, jointly with the defendant, guilty of the conversion complained of, but in which former action the present defendant had not been joined. To this plea the plaintiffs demurred. The court upon argument was divided, whether the bar were good or not, and no judgment was given; but the matter was ended by arbitration, according to the report in Cro. Eliz. The effect of the resolutions in that case, as reported in 6 Rep. 7, was, "that the law has provided greater safety and remedy for matters of freehold and inheritance than for debts and chattels—for there once barred always barred"; but that in matters of freehold the party may bring an action of a higher nature and therein try the matter again. Now, although if it be true that the same matter may be thus tried again, yet the former judgment is no less conclusive upon the immediate right then in demand as far as that former judgment purports to bind, and against all such parties as it is competent by law to bind. Upon the complaint made by Lord Coke in his preface to the 8th Report, and which is referred to and again repeated in this report, I have observed already and again observe, that neither the one nor the other of these authorities at all touch the present question, which is that of the effect of a precise allegation made in pleading on record, and tried and found between the parties.

The case of *Incledon and Burgess*, 1 W. & M., as reported in 1 Show. 27, Comb. 166, and Carth. 65, was an action of trespass for breaking a close. Plea, a prescriptive right of common of turbary, etc. Replication, traversing such prescription. The rejoinder by way of estoppel was, that in such a term one of the plaintiffs brought an action of trespass against the defendant, wherein he pleaded the same prescription, and issue tried upon it and found for the defendant, and demurrer to the rejoinder. According to Shower the argument in favor of the demurrer against the estoppel was, that the parties were different; that there was another plaintiff who was not party to the former suit; and finally they took exception to the declaration for not concluding against the peace of both the kings. And on this last objection the court determined it, and not on the estoppel. The court, according to Shower, gave no judgment on the estoppel, but only said, "an estoppel upon a ver-

dict goes a great way; issue in tail shall never falsify it; but if one man is estopped and he joins another with him, whether this shall avoid the estoppel is a *quære.*" The report in Carthew only says, the court gave no opinion as to the matter in law, the estoppel, but judgment was given as to the objection taken to the declaration of *contra pacem domini regis*, and it does not appear to have been argued that it would not have been an estoppel, if clear of other objections.

In the report in Comb. 166, the argument on the estoppel turned on there being another plaintiff joined. Lord HOLT says, "the meaning of *Ferrers' case* is, that it is a bar for the same individual thing; but here is a new cause of action: 13 E. 4, 2, 3, 4; there one trespass is a bar to another by way of estoppel; that is, for taking a villein; but that is grounded perhaps on the reason of the favor of liberty: 7 H. 6, 8. In trespass on an issue, whether such an one died seized, a verdict was a bar to another action of trespass by way of estoppel, because there issue was joined on a matter in the reality. As to the section of Littleton before cited, the joining can not privilege, as a release by one, who afterward joins with another; that release is pleadable to both; if this had been in a real action, where there might be summons and severance, there it is admitted it would be an estoppel." DOLBEN, Justice, said, "Ferrers' case is not like this; for here is a new cause of action—a new trespass; but in Ferrers' case it was another action for the same trespass. And the court was certainly against Tremain." It must certainly be admitted that the present question in substance arose and might have been decided, but was not decided in the above case of *Incledon* v. *Burgess*, and that the decision proceeded on another ground. It appears that HOLT, Ch. J., was aware of the case in 13 E. 4, 2, 3, 4, of the estoppel pleaded in the action of trespass for taking a villein; and also of the case in 7 H. 6, 8; but he certainly is not warranted by anything to be found in the report of 13 E. 4, in suggesting that the decision in that case was grounded on any reason in favor of liberty:[1] nor, as to 7 H. 6, 8, in saying that the estoppel in that case was sustained, because there the issue (which was on the dying seized of a certain person) was joined on a mat-

[1] *Vide* Co. Lit. 124.

ter in the reality. The only question in the case 13 E. 4, was that which was made by Catesby, *i. e.*, upon the identity of the matter in issue. There by partition the villein, who had been regardant to a manor, was allotted with certain lands to one sister in gross, and the manor to the other sister. The ancestor of the villein had answered in the former suit, in which it had been alleged that he was a villein regardant; that he was free and not a villein in manner and form as alleged, and it was so found. And the effect of this finding as an estoppel, which was relied upon by the plaintiff in that suit (the son of the supposed villein in the former) was rested in argument, not on the ground that it would be no estoppel, if the issue were the same, but on the ground of the issue being different, thereby admitting that it would have been an estoppel if the issue had been the same; and of that opinion BRIAN and the rest of the court seem to have been. The case in the Year Book, 7 H. 6, 8, 9, was this: Assize was brought against Popham and others, and the plaint was of a mill, with other lands and tenements. And Popham said that assize ought not to be, for one J. Popham was seized of the tenements, now put in view and plaint, in his demesne as of fee, and died so seized, after whose death plaintiff claimed as by force of a lease made to him by the said J. Popham for term of life; whereas nothing passed by the deed; and demanded judgment. The plaintiff said, that the father of the tenant had nothing but by the disseizin done to the plaintiff, and he made continual claim, and could not enter for fear of death; to which the tenant said, that at another time he brought trespass against the plaintiff, in which the plaintiff justified, because the father of the tenant leased to him for life, and the tenant said that his father died seized; and this was found for the tenant, and he recovered damages; judgment if he shall be received to defeat this issue once found. ROLFE, who argued for the plaintiff that he should not be estopped, said, "he knew well that the plaintiff should not be received to say that the tenant's father did not die seized, which had been tried in the writ of trespass; but to aver a thing which stands well with the first issue, it seems he shall be received; because it does not follow that if he died seized, therefore he died seized of a good estate; but we have shown how he died seized."

So that it seems clearly admitted by those who argued against the estoppel, that the party was estopped as to the very issue found against him, but not as to other matters consistent therewith; that is, consistent with the fact of dying seized, but avoiding the effect thereof in point of law (that is, avoiding its effect as a descent to toll an entry) by the disseizin, continual claim, and non-entry for fear of death as alleged. COTTESMORE then says: "In writ of trespass of close broken the issue trenches well enough in the reality, as if the defendant justify his entry by reason of inheritance which he has in the freehold. If this be traversed this shall be peremptory, and so it was in our case. Popham brought trespass. The (then) defendant pleaded in bar, because of a lease made to him for life, and the plaintiff made title by descent of the inheritance, which was traversed and found with the plaintiff, which issue was merely in the reality. Wherefore, it seems to me that the (now) plaintiff shall not be received now to disturb it." MARTIN says: "As my companion has said, the issue is as high in a writ of trespass, if taken in the reality, as in an assize; and if the present plaintiff in the writ of trespass had traversed the descent as he did, and it had been found with the plaintiff, and the plaintiff had also brought trespass, should he be permitted to avoid the descent by such descent as he has now done? I say not. No more shall he be received in this assize where the plaint is of the same tenements."

The case came on again, 7 H. 6. fo. 20, when MARTIN said he thought the plaintiff should be estopped to avoid the descent, for this was found once against him with the now tenants, upon which they recovered their damages; and for this the descent, which was the cause of the judgment and upon which judgment was given, ought to be understood to be a good descent, and especially *per ent. primes.* And there was a like case, where a release was pleaded in bar and the plaintiff said it was made by duress of imprisonment, and was afterwards nonsuit, and brought a new writ, and the release was again pleaded in bar; and he would have avoided the deed, because it was made at a time when he was within age, and he was not received so to do; for that when he had said the deed was made by duress, etc, he acknowledged it to be

good in all points but that. Likewise in this case, when the descent is found against the plaintiff, it shall be holden as acknowledged by him; and if so it is to be understood as well acknowledged, as at this time other matter was not shown. COKAIN contended that the continual claim was contrary to the issue; wherefore the averment could not be received. But STRANGEWAYS (who was a judge) said it was not contrary, and that the averment might be received. And he thought that the inquest had only to inquire if J. Popham, the father, died seized in fact, which they had done; but the matter of law arising from the continual claim was not in charge to them. And that it seemed to him a marvelous thing to intend a matter upon a verdict necessarily, of which, nevertheless, the inquest had not power to inquire. So that it seems clear that STRANGEWAYS, who differed from MARTIN, thought the finding was an estoppel as far as it went. Bro. tit. Estoppel, 77, says, in his abridgment of this case, which was not decided "*Optima opinio* was that it was a good estoppel"; and concludes, "*sic vide*, issue tried in action of trespass, and judgment given upon this, is a good estoppel in a real action." By this case it appears to have been on all sides then admitted in argument, that an issue taken and found upon a traverse of a precise fact, material to the right in question in an action of trespass, is equally peremptory by way of conclusion as to that same fact, and upon the same right, between the same parties in an assize. The authorities, therefore, which Lord HOLT referred to in *Incledon* v. *Burgess* would, if further examined, have warranted the court (supposing the difference of parties to have opposed no objection to their so doing) in then giving a judgment upon the point now in question, as well as upon the other point of *contra pacem*, etc., on which it was actually given.

As to the case of *Basset* v. *Bennet*, in which a new trial was moved for, because a verdict was taken for the defendant both on the general issue and on the plea of *liberum tenementum*, whereas there was only evidence to support the finding for the defendant on the general issue; and where the new trial is said to have been refused, because the court held that the finding on the *liberum tenementum* would not prejudice the plaintiff, as a judgment in a possessory action

was not conclusive on real rights. If it were indeed so laid down by the court, the doctrine must certainly be received with some degree of qualification and allowance. The plea would be conclusive that at the time of pleading the plea the soil and freehold were in the defendant; and if properly pleaded by way of estoppel, it would estop the plaintiff, against whom it was found, from again alleging the contrary. But if not brought forward by plea as an estoppel, but only offered in evidence, it would be material evidence indeed that the right of freehold was at the time as found, but not conclusive between the parties, as an estoppel would be. In that case the proper course would certainly have been for the judge at the trial to have discharged the jury from finding any verdict on the plea of *liberum tenementum*, on which no evidence was given.

As to the other case relied upon by the plaintiff, of *Sir Frederick Evelyn* v. *Haynes*, which was a second action for obstructing a watercourse, tried before Lord MANSFIELD upon a plea of not guilty, and where a verdict for the plaintiff in another action brought against the defendant for another obstruction to the same watercourse was given in evidence, Lord MANSFIELD held, very properly, that the plaintiff had not obtained such a determination of his right by the former verdict as the law considered as conclusive. It could only be conclusive upon the right, if it could have been used and were actually used in pleading by way of estoppel, which it could not be in that case; first, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel thereupon in the second action; secondly, it was not even pleaded by way of estoppel in the second action, but only offered as evidence on the general issue; and in order not to be an estoppel it must have been, as already observed, pleaded as such by apt averments.

As to the case of *Kinnersley* v. *Orpe*, it is extraordinary that it should ever have been for a moment supposed that there could be an estoppel in such a case. It was not pleaded as such, neither were the parties in the second suit the same with those in the first. The doubt seems rather to be, whether the former record in the action of trespass was at all admissible in evidence upon the subsequent action for penalties for

fishing, under the statute 5 Geo. 3, C. 14, S. 3, 4, against the defendant, who was no party to the former action, than as to any conclusive effect it could have had if pleaded by way of estoppel, which, however, it was not in that case.

None of the cases, therefore, cited on the part of the plaintiff, negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties, or their privies. The cases adverted to by Lord HOLT, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities on the subject of protestation and estoppel cited from Bro. Abr. Protestation, pl. 9, Fitzherbert, Estoppel, pl. 20, are in our opinion, as well as upon the reason and convenience of the thing and the analogy to the rules of law in other cases, decisive, that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch, and consequently that the plaintiff ought to recover.

Judgment for the plaintiff.

FEVERSHAM v. EMERSON.

(24 Law Journal, N. S. 254. Court of Exchequer, 1855.)

[1] **Estoppel to be plead specially, and at first opportunity.** An award fixing the boundaries between two parishes, and fixing the *locus in quo* for the getting of stone (or jet ore) by the lords of the two manors: *Held*, not an estoppel upon a subsequent action of trespass for taking jet ore in the awarded premises, the estoppel not being pleaded specially and at the first opportunity.

Trespass for breaking and entering certain land of the plaintiff, called Cranmoor in Bilsdale, in the parish of Helmsley, and digging quantities of jet ores, etc.

Plea, *liberum tenementum*, not guilty, and other pleas. Issue thereon.

At the trial before PARKE. B., at the last Yorkshire spring assizes, the facts were as follows: The plaintiff was the lord

[1] Bigelow on Est., 519-521; *Clink* v. *Thurston*, 47 Cal. 21.

of the manor of Bilsdale, in the parish of Helmsley, and the defendant was the lord of the manor of Kirkby, in the parish of Kirkby, and the action was brought to recover the value of certain jet dug by the defendant's order in lands alleged to be the property of the plaintiff.

The plaintiff, in support of his case, proved that, in 1811, a right to get stone in the spot in question having been claimed by one Cass, a freeholder, in Kirkby, and a trough belonging to him having been broken by a tenant of the plaintiff's father, Mr. Duncombe, who was then lord of the manor of Bilsdale, Cass brought an action against Mr. Duncombe, which was referred to arbitration, to which the then lords of the manor of Kirkby were parties. The arbitrators determined the boundary between the two manors of Bilsdale and Kirkby, awarded to Cass a right to get stone within certain boundaries, and also awarded to the lords of the manor of Kirkby a right to get stone for all purposes, within certain limits, including the *locus in quo*, and to sell the same without compensation to the lord of Bilsdale.

For the defendant, it was contended that the award was either void altogether, or that its true legal construction was to give the defendant the soil of the *locus in quo*, although the same was locally situated within the manor of Bilsdale. The learned judge was of opinion that the award was valid, and that it afforded strong evidence in favor of the plaintiff, although not operating by way of estoppel. The case was finally submitted to the jury, who found a verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him if the court should be of opinion that the place where the jet was obtained was proved to belong to the plaintiff.

A rule *nisi* having been obtained accordingly:

TEMPLE, ADDISON and ALDERSON, for the defendant, showed cause (June 14). First, the award is bad, or, if it is supportable, it can be supported only by construing it as deciding that the defendant had a freehold in Kirkby; secondly, the award ought to have been replied by way of estoppel; thirdly, if it had been so replied, it would not amount to an estoppel.

PARKE, B.—Confine your argument to the question of the estoppel; if it could not be replied, it is conclusive in favor of the plaintiff. You are to show that it could be replied.

The award might have been replied by way of estoppel, and that since that time no right of freehold had been obtained by the defendant in the *locus in quo*: 10 Vin. Abr. "Estoppel," L. 2, pl. 27. An estoppel may always be pleaded. *Outram* v. *Morewood*, 3 East, 346, Vin. Abr. "Estoppel," Q. pl. 14, citing 22 Hen. 6, pl. 50, 51. They then argued upon the effect of the award, contending that it could not act as an estoppel.

KNOWLES, COWLING and FARRER for the plaintiff, in support of the rule. The award could not be replied as an estoppel, as it did not relate precisely to the same point. In terms it decides merely as to the boundary of the two manors.

PARKE, B.—Assuming the award to be an estoppel and final, the *locus in quo* is within the plaintiff's manor of Bilsdale.

There is no precedent to be found for such a plea as has been suggested by the other side. *Outram* v. *Morewood* is in point. The plaintiff could have set out so much only as determined the boundary.

ALDERSON, B.—Suppose the award had determined the right of soil, could it not have been pleaded?

No precedent for such a plea can be found. A plea of estoppel is not a plea by way of denial as in a confession and avoidance, but is in the nature of a preliminary objection. Its effect is to allege that as against a particular party, another person is precluded from making such and such a statement. In the present case it would not be enough for the plaintiff to allege that an award had been made in 1812; he would have to go on and aver that nothing had happened since to change the title. But a replication in such a form would not be a replication by way of estoppel, but would amount to an implied denial of an averment in the plea.

ALDERSON, B.—Your argument goes to show that there can be no such thing as an estoppel; it tends to destroy estoppel altogether.

The replication suggested by the other side as proper to be

pleaded, would be nothing more than a denial of title. It would cease to be a replication by estoppel if the plaintiff were compelled to allege that the defendant had not gained any title since the making of the award.

PARKE, B.—According to your argument the decision in *Doe* v. *Wright*, 10 Ad. & E. 763, would be wrong.

ALDERSON, B., mentioned *Vooght* v. *Winch*, 2 B. & Ald. 662.

The note to *The Duchess of Kingston's Case*, 2 Smith's L. C. 445, is in point. The case in Bro. Abr. "Estoppel," pl. 158, cited in Vin. Abr. "Estoppel," L. 2, pl. 27, is incorrect in point of law, and can not be supported, for it alleges that the recovery was by S, and not by the plaintiff. Again, the plaintiff, by the very form of the defendant's plea, was precluded from replying the estoppel, for he could not divine on what title the defendant intended to rely. The case would have been different if the defendant had said that the *locus in quo* was his soil and freehold, because forty years before he was lord of the manor of Kirkby. But it can not be collected from the pleadings that he claims as lord of the manor. He does not say *quo jure* he claims title: *The Queen* v. *Blakemore*, 2 Den. C. C. 410; *The Queen* v. *Haughton*, 1 El. & B. 501; *Trevivan* v. *Lawrance*, 1 Salk. 276. The case is the same as if the general issue had been pleaded, in which case we could not have replied the estoppel.

Cur. adv. vult.

The judgment of the court was now delivered by PARKE, B.

In this case we have postponed our judgment for a short time, that we might look at a case in the Year Book, 22 Hen. 6 pl. 50, in order to see whether it militated in any way against the case in the Year Book, 2 Edw. 4, pl. 21. The case in 2 Edw. 4 shows clearly that to a plea of *liberum tenementum* you may reply an estoppel; that before the time in which the seizin is alleged, that is, at the time of the trespass, there had been a recovery of land by proceeding in formedon; that the court held to be good *prima facie* evidence, by way of replication, which must be answered by way of rejoinder. The very case that is referred to as having been decided in the time of the late king, turns out to be the case

of 22 Hen. 6 pl. 50, 51; the reference, indeed, is to 20 Hen. 6, pl. 47. I have looked to the exact reference. Then that case of 2 Edw. 4 says, that the very point that was decided before was, that it was a good replication to reply by way of estoppel: 20 Hen. 6 pl. 47. I can not find that the 20 Hen. 6 pl. 47, is a case that has any bearing upon it; but the case in the 22 Hen. 6 pl. 50, 51, has a direct bearing, and I dare say that is the case that was meant to be referred to as having been decided "in the time of the late king." That case proves that you may reply an estoppel. The case was this: it was an action of trespass, plea of *liberum tenementum*, replication, and an estoppel that the defendant's father enfeoffed the plaintiff with warranty, and the defendant was his heir, and therefore was bound by it; and then there was a rejoinder that, before the time the father was seized, the father had enfeoffed one Bradfield, who had enfeoffed the defendant, and that the defendant's father conveyed to the defendant and the heirs of the body of the son, and afterward the father enfeoffed the plaintiff, and before that showed that before the father enfeoffed the plaintiff with warranty he had already enfeoffed another person, and that that person had enfeoffed the father and son, so as to make them tenants in common. Then the argument on that is, that the plea is a double plea; after a good deal of argument they amend the plea, and do not take issue on one matter of rejoinder, but both. Then there is an objection that that is a departure from the original plea, namely, that there is not a tenancy in common, but that there is a sole tenancy. That is the case, and that case admits that there may be a reply of an estoppel in the case of *liberum tenementum*. That is in Brooks' Abridgment, tit. "Estoppel," pl. 89, which states the same thing, that there may be an estoppel to a plea of *liberum tenementum*. Therefore, there can not be any doubt but that there may be an estoppel to a plea of *liberum tenementum*, and that case, no doubt, of Edw. 4, is precisely in point.

Then the rule is perfectly established by a series of cases, that if a party means to insist on an estoppel he must take the first opportunity of doing so. If you intend to rely on a thing that the law does not favor, you must, at your own peril, take the first step that you can to do it. In this case,

no doubt, by the application of very ordinary industry indeed on the part of the plaintiff, he might have replied, as the decision in this case of the arbitrator in 1812 stated, that the defendant claimed under the arbitration. It is perfectly well settled law, and does not now admit of the least question, because there are no less than seven or eight cases upon the subject, that if a party does not take the first opportunity which the pleadings afford him of replying an estoppel, and pleads it afterward, he leaves the estoppel at large, and leaves the jury to determine upon the evidence without regard to strict law: *Trevivan* v. *Lawrance*, *Magrath* v. *Hardy*, 4 Bing. N. C. 782; *Armstrong* v. *Norton*, 4 Irish Cases, 100; *Speake* v. *Richards*, Hob. 206; *The Queen* v. *Blakemore*, *The Queen* v. *Haughton*. That is a matter beyond all doubt, there being an opportunity afforded to the plaintiff to reply an estoppel; if he does not do so, and lets slip the opportunity, then it is left at large. Then, I apprehend, this opportunity he originally had; he was in full possession of the award; the freehold boundaries of the manor are stated to be left to the decision of the arbitrator. It is quite clear, looking to the subject-matter in dispute, that the true point left to the decision of the arbitrator was the right in the waste of the manor; that matter remained at large for the jury to decide, and my brothers who heard the argument entirely concur, upon the facts of the case, that the jury were perfectly right in coming to the conclusion that the boundary of the waste was that which was alleged by the defendant, and not by the plaintiff. There can not be the least doubt that the matter should be decided in favor of the defendant. Consequently, the rule will be discharged.

FARRER applied to the court to allow an appeal.

PER CURIAM.—Why should we allow an appeal to do an injustice? It is questioned *strictissimi juris*. We can not allow an appeal.

Rule discharged.

[1]MANDLEBAUM v. THE NORTH AMERICAN MINING COMPANY.

(4 Michigan, 465. Supreme Court, 1857.)

New stock, in lieu of lost certificate, issued to innocent purchaser. A certificate of shares of the stock of an incorporate mining company was lost, or stolen, from the owner's possession, having attached to it a blank power of attorney for its transfer, signed by the original holder, of whom the loser purchased it. The owner, upon the loss, notified the company thereof, and not to transfer the stock on its books without his consent. Upon this notice the company instructed the loser how to proceed to obtain a new certificate; but he never proceeded for that purpose. Four months afterward, the certificate, with the blank power of attorney annexed, was purchased of one who had possession of it, by a purchaser who had no knowledge of the loss, and who bought in good faith. The purchaser induced the company, against the previous caution of the loser, to transfer the stock on its books and issue him a new certificate, which he then sold to the plaintiff. The plaintiff applied to the company for a transfer on its books, and a certificate to him, which the company refused, alleging the dispute about the ownership as a reason for such refusal: *Held*, that although the plaintiff bought with full knowledge of all the facts known to his vendor, and of his vendor's knowledge of them, the company, by permitting the transfer to said vendor, and the issue of such new certificate, were estopped from denying plaintiff's ownership, and refusing the transfer to him.

[2] **Quasi negotiability of stock.** By Section 7, Chap. 55, of the Revised Statutes, certificates of shares of stock, in companies organized pursuant to said chapter, may be transferred by indorsement and delivery, so as to confer a valid title as between the parties thereto; and *semble*, that the holder of a certificate so indorsed and transferred is entitled to the same rights respecting it, as against third parties, which the law confers upon the holder of commercial paper.

Case reserved from Wayne Circuit.

On the 4th day of December, 1851, the defendant was an incorporated mining company, duly organized under and by virtue of the laws of the State of Michigan. On that day, the defendant, by its officers, issued and delivered to one H.

[1] *Gass* v. *Hampton*, 16 Nev. 185.

[2] *Sierra Nevada Co.* v. *Sears*, Nev. 347; *Post* INJUNCTION; *Thompson* v. *Toland*, 2 M. R. 77; *Sherwood* v. *Meadow Valley Co.*, 50 Cal. 412; *Post* STOCK.

J. Buckley, a resident of the city of Detroit, a certificate of stock of said company. In December, 1852, Buckley sold said stock to one William A. Pratt, and at the same time delivered said certificate with a blank power of attorney attached, signed, sealed and subscribed by two witnesses. The name of no attorney or assignee was inserted in the power of attorney and it was in the form following: "Be it known to all whom it may concern, that do hereby constitute and appoint true and lawful attorney for and in name to transfer forty-two shares in the capital stock of the North American Mining Company of Detroit.

Witness hand and seal at this day of A. D. 185

H. J. BUCKLEY. [SEAL.]

Witnesses present, E. W. Fitzhugh, William T. Wheeler."

In December, 1852, said certificate with the power of attorney attached, was stolen or taken from the possession of said William A. Pratt, without his knowledge or consent, by some person unknown, and in a few days afterward the company was notified of the loss; also, that Pratt was the owner of said certificate, and the company was requested for that reason not to transfer said stock upon the company's books at the request of any person. Pratt was guilty of no negligence on the loss of the certificate; but it was proved that he exercised ordinary care and prudence in the preservation of it.

On the 2d of May, 1853, Walter Ingersoll, in good faith, and without any knowledge of the loss of the certificate, purchased it of one William Martin, and paid for it fourteen hundred dollars. On purchasing he ascertained the name and residence of Martin, and made the inquiries usual in a transaction of that kind.

On the 9th of May, 1853, the company, at the request of Ingersoll, and with a full knowledge of Pratt's claim to the certificate, transferred the same on its books by canceling it, and issuing a new one directly to Ingersoll. Ingersoll was notified of Pratt's claim to the certificate before this transfer. In March, 1854, Ingersoll sold the certificate to the plaintiff in this suit, informing the plaintiff at the time of Pratt's claim to the stock, and of his (Ingersoll's) knowledge of all the

facts above stated. Afterward, and on the 21st of April, 1854, the plaintiff presented said certificate to the company, and requested the same to be transferred to him on the company's books, but the company refused to make the transfer, alleging that they would not make the transfer until the title to the stock was settled between him and Pratt.

When Pratt notified the company of the loss of the certificate in December, 1852, the company wrote him, advising him that the certificate had not been presented at its office for transfer, and directing him to advertise the loss at the place of the loss and also at Pittsburg, at least six weeks, and informing him that the by-laws of the company required a good and sufficient bond of indemnity against all losses, costs, etc., which the company "might sustain in rejecting, or in any way connected with the transaction, before a new certificate could be issued," and also offering, in case the certificate could not be found, to do anything to obtain a re-issue that the proper officer of the company was authorized to do. Pratt never complied with the directions contained in the letter, by giving the notice and executing the bond therein mentioned, nor took any other steps to supply the loss.

The certificate of stock in question was made on its face "transferable only on the books of said company (upon the return of this certificate), in person or by attorney duly authorized, at their office, in the city of Pittsburgh, in the State of Pennsylvania, or at such other office as may be hereafter established."

It was usual and customary for persons dealing in the stock of the company, as well as that of other companies, to transfer the same by delivery merely, without any written assignment, and with a general understanding among the dealers in stock certificates, that there was an implied power or right in any subsequent assignee to fill up the blank in the power of attorney attached to such certificate with the names of the attorney and assignee, as might suit the convenience of the holder, and this was not usually done in the market, but only when the assignee wished to have a transfer of the stock on the books of the company. Such custom, at the time Ingersoll became the purchaser of the stock, was proved to be almost universal in Michigan, where the stock was purchased.

Upon the refusal of the company to make the transfer, the plaintiff brought an action on the case for such refusal. The defendants, under the plea of not guilty, gave notice of the loss of the certificate by the former owner, etc., and the court below (Hon. DAVID JOHNSON presiding) reserved the case for the opinion of this court.

J. V. CAMPBELL and W. P. WELLS, for plaintiff.

HOWARD, BISHOP & HOLBROOK, for defendants.

By the Court, MARTIN, J.

The certificate which was issued to Ingersoll by the defendants, became the property of the plaintiff by purchase, and was transferred to him in the manner in which it is found by the court below. Such instruments are usually negotiated in market. The indorsement was in blank; the power of attorney remaining to be filled up by whatever holder might desire an entry upon the books of the company of the transfer of the stock, and the issue of a new certificate to himself. By this indorsement and delivery the transfer was, under our statute, valid, as between the parties thereto, the entry thereof on the books of the company being only necessary for the benefit and security of the company, and not to the validity of the holder's title. (See R. S., Ch. 55, § 7, p. 211.) Whatever title, then, Ingersoll had in the stock for which the certificate was issued to him, or acquired by such transfer upon the company's books and the new issue, this plaintiff now holds; and the transfer of this certificate he asks to have intimated upon the books of the defendants, and for a new certificate to be issued to him thereupon. This request the defendants refuse to comply with, until the title to the stock represented by the original certificate acquired by Ingersoll shall have been settled between this plaintiff and Pratt; and for such refusal this action is brought.

It becomes unnecessary in the view we take of this case, to inquire into Pratt's title under the original certificate of stock issued to Buckley; or into that of Ingersoll, under his purchase from Martin. Neither is it necessary to inquire into the rights of Pratt as against Ingersoll's title, while the latter

held the certificate now owned by this plaintiff, and which was substituted for the one he claims to have owned, nor what may be his rights as against the defendants, or as against this plaintiff, should he assert them by proper proceedings in law or equity. Indeed, there would be an impropriety in doing so, for he does not appear as a party in this suit, nor can we see that it is defended at his instance, or in his behalf. That it is the duty of the company to allow intimations of transfer of stock to be made upon their books, upon the application of the owners thereof, is not denied, nor is the liability of the company in case of an improper refusal, questioned, and it appears that upon the entry of the transfer, the company cancels the original certificate, and issues a new one to the transferee. Before Ingersoll presented his certificate to the defendants, in order that the transfer might be thus intimated and a new certificate issued to himself, and indeed, before he purchased it from Martin, the defendants had been informed by Pratt of his loss of the certificate he purchased from Buckley, and cautioned against transferring the stock to the holder thereof, if it should be presented for that purpose; notwithstanding this caution, the defendants did transfer it upon their books upon Ingersoll's request, canceled the certificate which Pratt claimed, and issued the one which is the foundation of this controversy; what may have induced the defendants to recognize the title of Ingersoll to the first certificate does not appear; perhaps it was the neglect of Pratt to take the steps for securing them against loss or liability, as prescribed in their letter, which is made an exhibit in this case, or perhaps from the long silence of Pratt and the lapse of time since the communication to him, it was concluded that he had no valid claim upon it, or that it had been adjusted between him and Ingersoll.

However this may be, the transfer seems to have been made by the company deliberately, and without any fraud or concealment on Ingersoll's part. Had they refused the request of Ingersoll, and compelled him and Pratt to interplead respecting, or otherwise to settle, their conflicting claims to the certificate, they could have fully protected themselves against the consequences of any transfer and new issue which might thereafter be made pursuant to such settlement; but not hav-

ing done this, and having recognized Ingersoll's title, canceled the original certificate and issued a new one to him, they can not now be permitted to question the genuineness of that recognition, or the validity of that new certificate upon this claim of Ingersoll's transferee.

When the company permitted this transfer to Ingersoll to be intimated upon their books, and issued this certificate to him, they well knew that it might, and probably would, pass from hand to hand, upon his indorsement, through numberless *bona fide* holders, before it would be returned for a like intimation of transfer and new certificate thereupon. it is true that this is not commercial paper in the strict sense of the term; but by our statute, as has been stated, it is transferable by indorsement and delivery, so as to confer a valid title as between the parties thereto, and is, we think, by this provision of the statute, so far assimilated to such paper that the holder is entitled to every right respecting it, as against third parties, which the law confers upon the holder of commercial paper. In this respect, the provisions of our statute are unlike those of every charter, and of the by-laws of every incorporated company to which we have been referred, and upon which adjudications have been made. It enlarges the effect of the indorsement and delivery, and thereby facilitates the transfer of these instruments, thus adding another element of value to them. Once indorsed, the certificate passes from hand to hand, like commercial paper, and an ordinary purchaser would, and under our statute well might, regard the usual indorsement, if genuine, as sufficient, and suspicion would naturally be lulled, and inquiry would be silenced beyond such as would, by mercantile law and usage, be required upon the purchase of commercial paper. And if inquiry were further pressed, and the party desirous of purchasing should seek further evidence of the genuineness of the title of his vendor, the entry upon the company's books corresponding with the issuing of such certificate, would, almost of necessity, impel him to the conclusion that up to that point the title was unquestionable, and that behind it he need not pursue his investigations. It would be regarded, and properly too, as the recognition by the company of a title upon which every subsequent purchaser could safely rely.

Such being the force and effect of the transfer and the certificate to Ingersoll, the defendants are estopped from denying their validity or from going behind them and asserting, in defense of this action, a title which was thereby repudiated. Now, when this certificate was issued, the defendants virtually guaranteed its genuineness to whomsoever might become the purchaser of it; and it would operate as a fraud upon the public to permit them, under such circumstances, to question the validity of the instrument, or to deny their obligation under it; no higher recognition of Ingersoll's title could be given than has been given, and the purchaser from him or from one deriving title from him, can by no principle of law or fair dealing be required by the defendants to look beyond their books to inquire under what circumstances it was issued. The principle of estoppel is peculiarly applicable to this case, both for the protection of private rights and upon grounds of public policy. "If" says PARKE, B., in *Freeman* v. *Cook*, 2 Exch. R. 654, "whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representations to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be precluded from contesting its truth." This principle applies as well to corporations as to individuals, and to acts as to assertions, and with conclusive force when these acts result from deliberate purpose, with a full knowledge of surrounding facts, and are induced by no fraudulent representations or concealments.

Nor is there anything in the circumstances attending the plaintiff's purchase of this certificate which relieves the defendants from the operation of this rule. It is true that he purchased with a full knowledge of all the facts known to Ingersoll; but he also knew that these facts were known to the company, and that Ingersoll's title had been recognized by them, notwithstanding Pratt's claim, and with full knowledge of it. The very fact that he purchased with such knowledge, is evidence of his reliance upon the acts of the defendants for the protection of his title and of *bona fides* in making the purchase. He had a right to believe that the defendants had deliberately recognized Ingersoll's title, and had assumed a liability to him and his transferees, after a full investigation

of that title; and he had a right to rely upon this new certificate as an assertion by them of their repudiation of Pratt's claim, and that all persons were safe in purchasing it, and of their undertaking, with whomsoever might become the owner, that his title would be recognized. And he may now insist that a responsibility thus deliberately assumed ought not to be resisted by the assertion of that claim which was thus disregarded when the certificate which he holds was issued.

Good faith and public policy require that the defendants should be held to this rule; and it is upon these broad grounds that this doctrine of estoppel stands interposed to prevent injustice and to guard against fraud, by denying to a party the right to repudiate his deliberate acts or admissions, when these have been acted upon by those persons to whom they were directed, and whose conduct they were intended to influence: 8 Gill. 239.

We have not been referred to, nor have we been able to find upon examination any case which is precisely parallel with the present, but we think the reasoning of all the cases, and especially of *Davis* v. *The Bank of England*, 2 Bing. 392, and of *Hunter* v. *The Westminster Internal Improvement Commissioners*, 14 Eng. L. & Eq. Rep., 379, 7 Exch. R. 780, sustains the conclusion at which we have arrived. In the former of these cases, when certain stock belonging to Davis had been transferred upon the books of the bank under a forged power of attorney, but, unlike this case, without notice to the bank, suit was brought for the refusal to pay over the dividends which had fallen due upon the transferred stock and for permitting the transfer. The court held that the bank was liable to the plaintiff for not paying over the dividends, notwithstanding the transfer; but in speaking of the rights of subsequent purchasers of the stock transferred under the forged power they use this language: "We are not called upon to decide whether those who purchased the stock transferred to them under the forged power might require the bank to confirm that purchase to them, and to pay them the dividend on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries

But to prevent, as far as we can, the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank can not refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought are not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping of which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank can not be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock has passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You can not look further, nor is it the practice ever to attempt to look further than the bank books for the title of the person who proposes to transfer to you."

Although this is *obiter dictum*, yet it is so consonant to reason and sound policy, that we do not doubt the correctness of the principle, nor hesitate to apply it to the case at bar.

If, in such a case, the bank would be prohibited from denying the right of subsequent purchasers of the stock, by a much stronger reason do we think these defendants are estopped from denying this plaintiff's right, since the transfer to Ingersoll was entered upon their books with full knowledge of Pratt's claim of title and of loss; and a certificate was issued thereupon to him, genuine in form, and containing nothing to excite suspicion, or to suggest inquiry on the part of the purchaser.

Let it be certified to the Circuit Court for the county of

Wayne as the opinion of this court, that the plaintiff is entitled to recover.

Present, MARTIN, GREEN, WILLSON, BACON, DOUGLASS, JOHNSON, JJ.

GREEN ET AL. v. PRETTYMAN.

(17 California, 401. Supreme Court, 1861.)

[1] **Acquiescence by standing by at sale.** In ejectment an instruction to the jury "that if they believed from the evidence that plaintiffs stood quietly by, and saw and knew of the defendant's purchase of the premises, his possession and improvements of the same, and that the defendant purchased and improved the same in good faith and not in fraud of plaintiffs' rights, and that the plaintiffs did not notify him of their claim, then that they, the plaintiffs, are estopped from denying his rights." *Held*, error upon the facts stated in the case.

Appeal from the Fifth District.

Ejectment for fifteen acres of land. The complaint filed July, 1859, sets out the title of the plaintiffs. The answer amounts to a general denial with adverse possession for nine years. The facts are substantially these: The ground described in plaintiffs' complaint, and a portion of which is admitted to be in the possession of defendant, was located in 1849 by Green, one of the plaintiffs, and Joshua Holden, who died in the year 1854, the plaintiff, Middlesworth, claiming title by deed from the administrator of the estate of Holden, and also by prior possession, which commenced in 1851. The premises were inclosed and improved by Holden and Green, who raised grain and garden vegetables thereon. In 1851 and '52 their workmen lived upon the premises. The miners then entered the inclosure and dug up and mined a portion of the ground. There was some evidence tending to show that persons from whom defendant claims entered upon a portion of the premises in 1850 or 1852; that defendant entered in 1853 or 1854, and that plaintiff Middlesworth had

[1] *McGarrity* v. *Byington*, 2 M. R. 311; *Stone* v. *Bumpus*, 4 M. R. 271; *Golden Terra Co.* v. *Mahler*, 4 M. R. 390.

on his house a notice forbidding all persons entering upon that portion of the premises inclosed with a brush fence.

The court instructed the jury that "if they believed from the evidence that plaintiffs stood quietly by and saw and knew of defendant's purchase of the premises, his possession and improvements of the same, and that the defendant purchased and improved the same in good faith and not in fraud of plaintiffs' rights, and that the plaintiffs did not notify him of their claim, then that they, the plaintiffs, are estopped from denying his rights." Plaintiffs excepted. Verdict for defendant, judgment accordingly, and plaintiffs appeal.

L. QUINT, for appellants.

The charge of the court was wrong, because, 1st, there was no evidence to support it; and 2d, it violates the law as laid down in *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 279.

E. F. HUNTER, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., concurring.

The court erred in giving the second instruction asked by the defendant. This instruction, taken in connection with the facts of the record, did not place the doctrine of equitable estoppel correctly before the jury. We have given the true rule in the case of *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 366, and in other cases; and a reference to those decisions will enable the court, on the next trial, to instruct the jury rightly upon this subject.

The other points do not seem to be well taken, but the statement is so imperfect that we do not think it advisable to pass definitely upon them.

Judgment reversed, and cause remanded.

TROXELL v. THE LEHIGH CRANE IRON COMPANY.

(42 Pennsylvania State, 513. Supreme Court, 1862.)

No estoppel, where no consideration—Revocation of parol authority to receive dues for ore. A widow, owning a life interest in an iron ore bed, allowed her son-in-law, the owner of the reversion, to make a conveyance of it to an iron company, at a given rate per ton. The dues for ore were paid to him alone, or to her alone, or to either in the presence of the other; the receipts of either were taken by the company, and for a number of years she allowed him to receive half the profits. Afterward she notified the company not to pay any dues except on her order, to which the company refused compliance, and she brought *assumpsit* for the dues accruing for the ore since the notice. *Held*, that as the widow was entitled to the profits of the iron ore for life, and there was no evidence that she had parted with her title thereto, she was not estopped from setting it up, as against her son-in-law, whose right was but a benefit or privilege granted by her, and which she could revoke at her pleasure.

Idem—Estoppel by assent to sale. 2. That she was bound by the sale by him to the company, made with her knowledge and consent, and was estopped from repudiating it so long as the ore bed was worked in good faith.

Revocation by notice to third party. 3. That her notice to the company was a good revocation of the authority of her son-in-law to receive any part of the amount due for ore; and that consequently the company were liable to her in *assumpsit* for all ore mined thereafter.

Error to the Common Pleas of Lehigh County.

This was an action of *assumpsit* brought by Christiana Troxell against The Lehigh Crane Iron Company, to recover the price of three thousand and seventy-nine tons of iron ore, raised and taken away by defendants from plaintiff's ore-bed in North Whitehall township, Lehigh county.

The case arose thus: Peter Troxell, deceased, was in his lifetime the owner of a tract of land situate in the said township, and died seized thereof. On the 30th day of March, A. D. 1830, he made his last will and testament, wherein, among other things, he devised all his real and personal estate to his wife, Christiana, until his son Edward arrived to the age of twenty-one years, then his wife to rent the plantation to Edward, she to receive the one third of the grain raised on it

until his youngest daughter, Drucilla, arrived to the age of twenty-one years, when he directed the same to be appraised by three men to be chosen by his three children, giving to his son Edward the first choice, to his son-in-law Jeremiah Ritter the second choice, and to his daughter Drucilla the third choice. If all refused to accept it at the valuation, it was to be sold by his executors. He then directed as follows, to wit: "Further, it is my will that the iron ore on the said plantation shall be excepted for the use of my dear wife during her natural life."

The testator died about the 30th of December, A. D. 1830, when the will was proved. In pursuance of the will, Christiana Troxell remained in possession of the plantation until Edward arrived at the age of twenty-one years, when she leased it to him. She continued to reside in the mansion house until the plantation was appraised, and subsequently up to about the year 1857. The plantation was appraised by three men on the 13th day of October, A. D. 1839, and Edward Troxell having refused to accept it at the appraisement, he and Jonathan Diehl, and Drucilla his wife, late Drucilla Troxell, by deed bearing date the 12th day of December, A. D. 1840, granted and conveyed the undivided two thirds part thereof to Jeremiah Ritter, intermarried with the other daughter of the said testator.

Prior to the testator's death, an iron ore mine was opened by Messrs. Balliet upon the plantation, and a considerable quantity of ore was taken out. On the 23d day of November, A. D. 1842, Jeremiah Ritter, with knowledge of the widow, entered into an agreement or lease with David Thomas, for the Lehigh Crane Iron Company, defendants, in which the right was given to them to enter upon the said plantation and dig, mine, and carry away all the ores and minerals which should be found in a certain field selected and agreed upon between Ritter and Samuel Glace, defendants' mineral agent, containing nine acres, more or less (which field embraced the opening made by the said Ballets), for the consideration of twenty-five cents per ton to be paid by the said defendants for every ton of ore taken away by them.

Defendants thereupon commenced to dig and take away ore, which they paid for semi-annually at the before mentioned

price per ton, sometimes to Ritter in plaintiff's presence, sometimes to Ritter upon plaintiff's order, and sometimes to plaintiff alone, which continued until about the 1st of February, 1858.

On the 16th day of December, 1857, the plaintiff wrote a letter to defendants, addressing John Williams, their employe, who for some time previous had made the semi-annual payments, notifying them not to pay any person except on her order, and that she intended to call for her money on the 8th of January, 1858; this notice she repeated by a similar letter, December 24, 1857.

About the first of February, 1858, the plaintiff called alone at the defendants' office, and received from John Williams about $700, being the amount due for ore taken away during the six months preceding January 1, 1858.

On the 1st day of July, 1858, plaintiff again called alone upon defendants and demanded payment for the ore taken out during the six months preceding that date, when payment was refused, the amount due on that day being $769.76, for which this suit was brought.

The declaration contained three counts; the first was for iron ore bargained and sold by plaintiff to defendants, and by them accepted and taken away from the lands late of Peter Troxell, deceased; the second was, that in consideration that plaintiff had permitted defendants to dig and carry away divers large quantities of iron ore from said lands, defendants would pay what it was reasonably worth. The third, for ore sold and delivered. On the 11th of January, 1861, four additional counts were filed; the first being, like the second original count, but on a *quantum valebant*, the others for money paid, lent, and had and received, to all which the defendants pleaded *non assumpsit*.

On the trial a number of points were presented by the parties, on which the instruction of the court was asked and given. Several bills of exception also were sealed on the admission and rejection of testimony, and the trial ended in a verdict and judgment for defendant. The plaintiff thereupon sued out this writ, and presented to this court thirty-four specifications of error, only two of which were insisted on in the

argument here. These two assignments of error presented the case on its merits, and are embraced in the following points submitted by defendants' counsel on the trial:

1. If the jury believe that from the 1st of January, 1858, to the 1st of July, 1858, defendants were in actual possession of the ore-bed or mine, claiming title thereto adversely to the plaintiff, they must find for the defendants. 3. If the jury believe that the plaintiff had full knowledge of Jeremiah Ritter's deed to the defendants before and at the time it was made, and allowed the same to be made without any objection or assertion of title in herself, and that the defendants, with no actual notice of her title, and upon the faith of her acquiescence accepted said deed and made large expenditures by reason thereof she is estopped now from setting up her title and the jury must find for defendants.

SAMUEL A. BRIDGES and CHARLES DAVIS, for plaintiff in error.

MARX & RUNK (with whom were JOHN D. STILES and A. H. REEDER), for defendant in error.

LOWRIE, C. J., delivered the opinion of the court, May 10, 1862.

The plaintiff's counsel abandoned on the argument here nearly all the assignments of error that appeared in the paper book, and argued the case entirely on its merits; yet we find it not very easy to pick out the merits from such a complication of objections, and the court below must have been very much embarrassed by them, and was possibly diverted by them from the real merits of the case. We do not say this in blame of the honorable and able counsel concerned in the trial, for most sincerely, we honor them too much to do that, and they were seeking nothing but justice. Counsel invariably take a party view of their case, often an extreme party view, and they are quite liable to fail in appreciation of the position of the judge, who, in seeking the very merits of the cause, naturally slights all undue refinements in the process of investigation.

The rules of practice in all kinds of business must have the same fundamental qualities of necessity, adaptedness, and adaptability. The carpenter has half a dozen bench planes for the same general purpose (besides many others for special purposes), and there can be no perfectly precise rules of discrimination in the use of them, and he may change the set of their bits at pleasure, within the bounds of reasonable fitness. No business could get along without this. And in a case like this, where the parties have made their bargain in an anomalous form, we can not expect to make a good job out of it by a strict adherence to rules of practice that are intended to be applied to regular transactions. We must not make precision of practice of more value than justice, and courts have often said so. We have just happened on a case where Lord Mansfield declares his disapprobation of "objections" which have no relation to the merits of a cause: 5 Burrows, 2827; and the Romans had a standing maxim in their law that required legal forms to yield to the evident equity. *Etsi nihil facile mutandum est ex solennibus, tamen, ubi equitas evidens poscit, subveniendum est:* Dig. 50, 17, 183.

The questions on the merits of this cause are fully expressed in the first and third points submitted by the defendants' counsel.

No doubt this ore-bed belonged to the plaintiff for life, with reversion to her son-in-law, Ritter. No doubt he sold the ore-bed to the defendants at twenty-five cents a ton, by a writing signed and sealed by him, and we presume that she agreed to the sale. She is therefore estopped from repudiating that sale if the defendants work the ore-bed in good faith. Equity estops her because she would wrong them by withdrawing her consent. But it does not estop her from a claim that does them no wrong; and such is her claim that the price shall be paid to her during her lifetime; she asks no more.

There is nothing to estop her from setting up her claim to the ore and the profits of it as against Ritter; nor any sort of legal evidence that she has parted with her title to him. No doubt she did allow him to receive half the profits for several years, but that does not give him title, and it is hardly decent for him to insist on it as such. We discover nothing

that prevents her from revoking that arrangement. It is quite evident that the defendants knew of her title, and of this arrangement between her and her son-in-law about the price of the ore. Possibly they may have litigation with Ritter also, but if they had drawn their agreement for the ore according to the title, they would have been saved from this. But they are not estopped by the form or nature of the agreement from disputing his title to the profits during her life after she has given them notice that she claims them all for herself. It is quite apparent that she did give such notice in December, 1857, and thus revoked the benefit intended for Ritter; and all payments after that to him during her lifetime are mispayments, unless he can show some better title than appears in the evidence. So far as her life estate is concerned, that notice is a good revocation of Ritter's authority to receive the price of the ore. Equity still binds her to respect the defendants' title so long as they respect her right to the price.

Her suit for the price is in general assumpsit, and we suppose that nearly all the complications of the case have arisen from an apprehension that the plaintiff might be defeated in this form, and are to be taken as abundant cautions against it. It is argued that because the defendant holds under the deed from Ritter, the suit must be on that. But in fact the defendant does not hold the plaintiff's title, but only Ritter's under that deed. It is by an equitable estoppel that her title is held, and equity estops the plaintiff only on condition that the defendant shall do equity to her. It therefore gives her the equitable action of assumpsit for her remedy, or a bill in equity for an account, if that does not answer. It treats her as selling the ore, and the defendants as contracting to pay for it, and we can find no fault with the form of the action.

This view of the case meets all the important questions raised upon the charge of the court, and sets aside most of the questions of evidence as being of no value. The receipts given by Ritter, before the notice to pay no more to him, seem to be of no importance, because the plaintiff claims for no part of that period, and the receipts by him since are quite irrelevant. It was well enough to show Ritter's title; it helps to understand the transaction. All the evidence of estoppel

seems to be useless, because, by her action, the plaintiff admits herself estopped before the notice. It seems like quite an unnecessary strictness to reject the answers of the defendant's clerk to the notice sent by the plaintiff; but the notice itself was all that was important. We do not discover anything else in the case that requires any special notice. These views substantially affirm the plaintiff's tenth and eleventh points, and they ought to have been affirmed below, so far as they affect this case.

Judgment reversed, and a new trial awarded.

POOL ET AL. v. LEWIS.

(41 Georgia, 162; 5 Amer. R. 526. Supreme Court, 1870.)

Riparian rights of furnace and mill owners. In a suit by the owners of a furnace on Stump creek against the owners of a mill higher up the creek, for interrupting the flow of the water, it was *held*, that the statutes of Georgia have not changed the common law rule relative to the use of streams not navigable. They secure to the owner of the land, over which the stream passes, the legal use of it, for the purpose of propelling such machinery as is suited to the size and capacity of the stream, provided the water is not obstructed for an unreasonable time, and is not diverted from its natural channel when it passes to the lands of the next proprietor.

Reasonable use of stream, a question for jury. "The question of a reasonable use of the water by the mill owner above, depending, as it must, upon the size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case, must be determined by the jury and not by the court."

[1] **Estoppel against asserting parol rights, by quiescence at public sale —Innocent purchaser.** The plaintiffs claimed that the original owner of the mill had agreed by parol that the free flow of water to the furnace should never be obstructed at the mill, but upon the decease of the mill owner his administrator sold the mill at public sale, and one of the plaintiffs was present, but gave no notice of any such contract: *Held*, that the plaintiffs were afterward estopped from setting up this parol contract to the injury of innocent purchasers of the mill.

The plaintiffs brought this action alleging that they were the owners of a furnace on Stump creek, and had the right to

[1] *Rice* v. *Bunce*, 49 Mo. 231; 8 Am. R. 129; *Oregon Co.* v. *Trullenger*, 4 M. R. 247.

use the waters of said creek therefor; that the defendants owned a mill above on said creek, and had, by means of dams, etc., prevented the water from flowing in its usual course and volume to their works, and thereby, for three months during the summer, prevented them from operating their furnace. They also claimed a parol contract with the father of defendants, then owning said mill, whereby he bound himself and his privies never to obstruct the water.

The defendants pleaded the general issue and showed that their mill was built in 1845, and had been run ever since; that they had used the water as carefully as they could to prevent damage to plaintiffs; that they had never stopped the water but once or twice, and then to repair their machinery. It appeared also that in summer the creek was very low, and that it was customary to stop the furnaces during that season and that the water was then hardly sufficient to run the furnace had the mill been away. It also appeared that defendants bought the mill at public auction at the sale of their father's property, and that Pool was present at the sale and gave no notice of any contract with their father as to the use of said water and that they had no knowledge of it.

The jury found for the defendants, and the plaintiffs appealed from the order refusing a new trial.

W. T. WOFFORD and WARREN AKIN, for plaintiffs in error.

ABDA JOHNSON by W. H. DABNEY, JOHN W. WOFFORD and D. A. WALKER, for defendants.

BROWN, C. J.

The controlling question in the case is, had the defendants the right to use the water in the stream as they did use it, for the purpose of running their mill, located a short distance above the furnace of the plaintiffs? Judge PARROTT, who presided on the trial, left it to the jury to determine whether the use and detention of the water by the defendants, were reasonable and necessary under the circumstances of the case made by the evidence. We see no error in this.

In Washburn's Easements and Servitudes, side page 267, the rule is laid down as follows: "The question of a reason-

able use of the water by the mill owner above, depending, as it must, upon the size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case, must be determined by the jury and not by the court." It seems to us that a correct rule as to the use of the water by the owner of a mill on a stream, is found on side page 253 of the same book, in the following language: "But in doing so, he must use the water in a reasonable and proper manner in propelling and operating a mill, suited and adapted in its magnitude to the size and capacity of the stream and the quantity of water flowing therein. Nor could he detain the water an unreasonable length of time, nor discharge it in such excessive quantity that it would run to waste. He must use the water in such a way and manner that every riparian proprietor, at points further down the stream, will have the use and enjoyment of it, substantially, according to its natural flow, subject, however, to such disturbance and interruption as are necessary and unavoidable, in and by the reasonable and proper use of it for the operating of a mill of suitable magnitude, adapted and appropriate to the size and capacity of the stream and quantity of water flowing therein."

In the case of *Hetrich* v. *Deachler*, 6 Penn. R. 32, the plaintiff's works were an ancient grist mill, the defendant's a modern saw mill, on the same stream. In operating his mill the defendant sometimes detained the water from three to five days or more, and besides using the water for driving his mill, applied it to irrigating his land. Besides this, he at times let out so much water from his own as to flow the plaintiff's mill. The court were urged to rule that such a detention must necessarily be objectionable, as being a violation of the plaintiff's rights. But they declined so to do, and submitted the question to the jury, whether it was a reasonable detention of the water or not. If he detained it no longer than was necessary for his proper enjoyment of it, the plaintiff can not recover, unless, as the court added in their instructions, the defendant detained the water vexatiously or wantonly. And the whole court, in commenting upon and approving those instructions, refer, as a test of what may be done, to the "reasonableness of the detention depending, as it must, on the

nature and size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case." See also on this point *Mabie* v. *Matteson*, 17 Wis. 1; *Springfield* v. *Harris*, 4 Allen, 496. A large proportion of the cases, where conflicting rights are set up by such mill owners to use of water, will be found to have been determined by the application of this broad rule, of what is a reasonable use, in view of the circumstances of each particular case. See Wash. E. & S., side page 266, and a number of cases there cited.

Taking this to be the correct rule, and applying it to the evidence in this case, we are satisfied these plaintiffs had no cause of action. We think the defendants made only such reasonable use of the water, under the circumstances of this case, as they had the legal right to make. The water was low in the stream, and the furnace was being run, as is shown, contrary to the practice of the judicious operators, on the same stream, under like circumstances, at a time when true economy required that it be stopped, and that the time be appropriated to laying in stock for use, till the rise in the stream resulting from the fall rains, after which there was sufficient water for all.

At any rate, the defendants, who first got control of the water when it was too weak to supply all, had the right to detain it a reasonable time for necessary use at their mill. The court submitted the question of the reasonableness or unreasonableness of the use made of the water by the defendants to the jury, and they found in favor of defendants. And, after a careful review of the testimony given in on the trial, we are satisfied they found correctly. Section 2205 of the Revised Code declares that "the owner of a stream not navigable is entitled to the same exclusive possession thereof as he has of any other part of his land, and the legislature has no power to compel or interfere with him in its lawful use for the benefit of those above or below him on the stream, except to restrain nuisances." Construing this section with sections 2201 and 2967, we think they do not change the common law rule already laid down. They secure to the owner of the land over which the stream passes, the legal use of it, for the purpose of propelling such machinery as is

suited to the size and capacity of the stream, provided the water is not obstructed for an unreasonable time, and is not diverted from its natural channel when it passes to the lands of the next proprietor.

But it is claimed that the evidence showed that there was a verbal contract or understanding between Pool, one of the plaintiffs, and Dr. Lewis, who built the mill and was a partner in the furnace when built, and for several years afterward, that the water should never be obstructed at the mill, but should flow constantly in the channel of the stream to the furnace. It is not pretended that this license or contract, or whatever it may have been, was in writing. And the court below ruled that the plaintiffs could not have the benefit of it, because the right claimed to have been conveyed by it, which was a right in the plaintiffs to prohibit the detention of the water at the mill for such reasonable time as the law would otherwise allow, was an interest in land which could only be conveyed in writing. See Code, Sec. 1940. While we are not prepared to say the court committed error in this ruling, we do not deem it necessary to decide the question. The evidence shows that Pool, the plaintiff, was present when the land upon which the mill is located was sold at administrator's sale, as the property of Dr. Lewis, and that he gave the bidders no notice of this parol license or contract, but permitted them to invest their money in the said property without knowledge of the right he now seeks to set up, which existed, if at all, only in parol. Under this state of facts, we hold that Pool was estopped from afterward setting up this parol license or contract, to the injury of the purchasers. And the parties are left just where the law governing in such cases, without license or contract, leaves them.

There were numerous charges asked, and exceptions to the charge as given by the court, and his refusals to charge, upon which we are asked to pass judgment. But as the points already decided must, in our opinion, control and dispose of this litigation, we deem it unnecessary to do so.

Judgment affirmed.

MARQUART ET AL. v. BRADFORD ET AL.

(43 California, 526. Supreme Court, 1872.)

Abandonment no element of estoppel. In ejectment for a water ditch, an instruction which mingles two legal principles, abandonment and estoppel *in pais*, is objectionable. A party can not be held as estopped by matters *in pais*, to assert title, unless at the time when it is claimed the estoppel was worked, he held the title. If he then held such title, it can not at the same time be claimed that he had lost it by abandonment.

Evidence by representative of deceased party. An objection to testimony of defendant concerning matters which occurred prior to the death of an individual, on the ground that the plaintiff is the representative of the deceased, will not be sustained unless it appears that the plaintiff is such representative within the meaning of § 393 of the California Practice Act.

Appeal from the District Court of the Eleventh Judicial District, El Dorado County.

This was an action of ejectment brought to recover a part of a water ditch. In 1857 John Curran and others constructed a ditch from the falls of the Gold Hill canal to a mining claim called the "Curran Claim." In 1860–61 Curran, with the assent of the other owners, sold the ditch and claim to defendant Bradford and one Wm. T. Davis, who died in September, 1868. In 1862 one Charles Aler discovered a mining claim on Starr Hill. He made a verbal agreement with Davis that Davis should give him one half the ditch for one half the claim. Afterward, in 1863, Davis and Aler agreed to sell one Bingham a fourth interest of ditch and claim. The claim on Starr Hill was not on the line of the ditch, and in order to get water to the claim it was necessary to construct a flume from the ditch to Starr Hill. This flume was constructed by Davis, Aler and Bingham, from a point on the ditch at Tinnie's Vineyard; and it is only that portion of the ditch extending from the falls in the Gold Hill canal to Tinnie's Vineyard that is in controversy in this action. All that portion of the ditch extending from Tinnie's Vineyard to the Curran claim is not mentioned in the complaint. The ditch was used up to 1865 by Davis and Bingham, taking out water at Tinnie's Vineyard, and the defend-

ants taking it at Curran claim; on the 23d of August, 1867, Davis and Bingham executed a deed to Tie Hoon and Ah Sing of the claim on Starr or Cement Hill. After describing the claim the deed contains this clause: "embracing a cabin, and all ditches, races and flumes, etc., now on and used for the working of said claim, including about one mile of flume for the purpose of bringing water to said claim." This one mile of flume was the means used for bringing water from the "Curran ditch."

On the first of July, 1868, Ah Young and Ah Gee deeded the same property to the plaintiffs, and upon this deed the plaintiffs base their right of action.

Defendant Cockbill, in his answer, alleged that in May, 1865, he purchased said Davis' undivided half of the ditch in consideration of three hundred dollars, and paid the price, and was placed in possession, and made improvements on the ditch, and had since remained in possession; that Davis promised to make him a deed, but failed to do so, and that the plaintiffs bought, well knowing that he was in possession under a claim of right. He asked that the plaintiffs be compelled to convey to him.

On the trial the defendant Bradford was called as a witness by the attorney for the defendants, and was asked several questions in relation to who had possession of the ditch and used it prior to Davis' death. The plaintiffs objected to any evidence on these points being given by Bradford, because they claimed title under Davis. The court sustained the objection. It did not appear on the trial that Bradford had ever sold his interest in the ditch, and as Davis and Bingham's deed to the Chinamen was a conveyance of the entire property, the plaintiff insisted that his failure at the time to object to Davis' sale, either estopped him or amounted to an abandonment.

The plaintiffs had judgment and the defendants appealed.

The other facts are stated in the opinion.

GEORGE E. WILLIAMS, for appellants.

Bradford has never sold his interest, and it is that interest which he claims in this action.

The court must have concluded that the evidence was not strong enough to sustain an estoppel *in pais*, or an abandonment, and therefore in its instruction it mixes the two. This instruction contains a new definition of abandonment. See *Richardson* v. *McNulty*, 24 Cal. 345. The instruction does not correctly define an estoppel *in pais: Davis* v. *Davis*, 24 Cal. 40.

GEO. G. BLANCHARD, CHAS. F. IRWIN and GEO. H. INGHAM, for respondents.

The instruction was correct, whether applied to abandonment or estoppel. Bradford relied on prior possession, and an abandonment may be inferred from acts of omission as well as commission: *Davis* v. *Perley*, 30 Cal. 637. The instruction as to estoppel gives the correct rule: *Davis* v. *Davis*, 26 Cal. 23.

By the Court, RHODES, J.:

The second instruction given to the jury at the plaintiff's request is as follows: "Should the jury find from the testimony that Bradford ever had any interest or title in the property, they may take into consideration whether he had divested himself of such title, either by abandonment or otherwise. The question of abandonment is one of intention, of which the jury are the exclusive judges; and in order to determine such intention, they must take into consideration all the facts and circumstances before them; and if they find that Bradford stood by and saw Davis make a sale of the ditch to plaintiffs or their grantors, and made no objection or asserted any title in himself, he is bound by the sale." The instruction is, in our opinion, objectionable. It mingles together, in such manner as to mislead the jury, two legal propositions which are quite distinct and proceed on different principles—abandonment and estoppel *in pais*. It appears to treat an estoppel *in pais* as constituting an element of abandonment, or as one of the circumstances from which it might be found by the jury. But a party can not be held as estopped by matters *in pais*, to assert title, unless at the time

when it is claimed the estoppel was worked, he held the title. If he then held such title, it can not at the same time be claimed that he lost it by abandonment.

The testimony of defendant Bradford as to matters which transpired before the death of Davis, was objected to by the plaintiff on the ground that they are the representatives of Davis within the meaning of section three hundred and ninety-three of the Practice Act. They claim title, as we understand the case, through two deeds: The deed of Davis and Bingham to Tie Hoon and Ah Sing, and the deed of Ah Young and Ah Gee to plaintiff Marquart. The testimony is not sufficient to show that the grantees in the first, and the grantors in the second deed are the same persons. It not appearing that the plaintiffs were the representatives of Davis within the construction of that section, as given in *Davis* v. *Davis*, 26 Cal. 23, the objection to the testimony should have been overruled.

Judgment and order reversed and cause remanded for a new trial.

MERCER MINING AND MANUFACTURING CO. v. MCKEE'S ADM'R.

(77 Pennsylvania State, 170. Supreme Court, 1874.)

Estoppel by use of terms in a special sense—Royalty—Screened coal—Evidence. McKee sold the coal on his farm to defendant, reserving a perpetual royalty of ten cents for each ton "of screened coal mined and removed from said lands." The defendants mined and screened and removed both lump and nut coal: *Held*, that evidence was inadmissible to show that "screened coal" is understood among coal merchants and miners to include only "lump coal"; that "nut coal" is not "screened coal" in the common acceptation of the words, or, that at the time of the sale there was no market for "nut coal," and that it was removed from necessity and did not pay the expense of mining and marketing.

The words "screened coal" construed. The coal in this case was in fact "screened coal" and the court applied the words of the contract to the fact of screening, and not as a technical term applying to a certain kind of coal, and *held* that defendant having screened and removed both kinds of coal, was estopped to allege that either was not screened coal.

Error to the Court of Common Pleas of Mercer County.

This was an action of covenant brought Oct. 7, 1870, by James McKee against the Mercer Mining and Manufacturing Company. The plaintiff having died after the commencement of the suit, his death was suggested, and Alexander McKee, his administrator, substituted as plaintiff.

The action grew out of the covenants in an agreement between James McKee of the first part, and Hugh Wick of the second part; the defendants became the owners of the interests of Wick by virtue of the agreement, and subject to his liabilities under it.

The agreement was dated August 27, 1863. By it McKee sold and conveyed to Wick, "his heirs and assigns, all the mineral coal, limestone and iron ore, in, upon and under the farm in the township of Findley * * * containing 100 acres," with privilege to enter, dig out, remove, etc. * * * * *

"And the said party of the second part, by himself or assigns, agrees to pay to the party of the first part, his legal representatives or assigns, the sum of ten cents for each ton (of 2,240 lbs.) of screened coal mined and removed from said lands herein described, and the price of rent of the ore mined and removed from said lands for such gross ton of 2,240 lbs. shall be ten cents for screened or cleaned ore, and ten cents for 2,240 lbs. of limestone; and the party of the second part is to pay all United States taxes on minerals mined."

The case was tried August 19, 1874, before MAXWELL, P. J.

The plaintiff gave the agreement in evidence.

He called E. Hosack, who testified: "I was in the employ of the defendants. I was dumping coal, attending to it after it was screened. One fifth nut coal. Lump coal runs over first screen. Nut coal drops through to second screen. Nut coal was always shipped away. All shipped except what was used or sold in the neighborhood."

C. Meek testified: "The quality of coal that passed over the second screen is nut coal; part used and the balance shipped."

The plaintiff gave evidence on the same point, and also for the purpose of showing the amount of coal mined, and rested.

The defendants then proposed to prove by A. Burnett and others, that the term "screened coal," used in the contract of the parties, is taken and understood among coal merchants and miners to include only lump coal, and not what is called and known as nut coal.

That nut coal is not merchantable coal or screened coal, in the common and general acceptation of the term.

Plaintiff objected to the above evidence—

1. Because the contract between the parties being in writing its construction is a question for the court.

2. If not a question of construction for the court, it is one of fact, for the jury to determine from the evidence.

3. The case is one not requiring the testimony of experts.

4. The evidence offered would contradict the written agreement of the parties.

Defendants also proposed to prove the relative value and quality of lump and nut coal, for the purpose of showing that nut coal is not screened coal in the common acceptation of that term, and that at the time the contract was made between the parties there was no market for nut coal in this section, and that the same was removed from the bank as a matter of necessity and did not pay the expense of mining and marketing.

Plaintiff objected to this offer because it was irrelevant.

Both offers were rejected, and several bills of exception sealed.

The defendants gave evidence as to the amount of coal mined.

The plaintiff's first point was: As a matter of law the plaintiff is, by the express terms of the lease, entitled to recover ten cents for each and every ton of coal mined by the defendants, and remaining above either of the two screens described by the witnesses, provided the same was screened and removed for the purpose of sale or profit.

The answer of the court was: "To the first point we answer, that the plaintiff has a right to recover ten cents for each ton of 2,240 lbs. of screened coal and which has been mined and removed from the lands; and if you believe that there were two screens and two kinds of coal there screened, called lump and nut coal, then he has a right to recover ten cents

for each ton of 2,240 lbs. of either lump or nut coal mined and removed from the lands."

The defendants' points were—

1. The term "screened coal," used by the parties in this contract, includes only merchantable lump coal that is screened, and not what is known as nut coal.

2. The term "screened coal" includes only such screened coal as would satisfy a contract where one person had agreed to deliver a certain quantity of screened coal to another person at a stipulated price, to wit, merchantable coal screened, and not nut coal, which is inferior in quality, though screened.

3. Nut coal is not screened coal in the general and common acceptation of the term as used in this district.

These points were answered in the negative.

The verdict was for the plaintiff.

The defendants took a writ of error; they assigned for error the rejection of their offers of evidence and the refusal of their points.

GRIFFITH & MASON, for plaintiff in error. The meaning of words in a written contract may be shown by parol: *Gibson* v. *Tyson*, 5 Watts, 34; *Case* v. *Cushman*, 3 W. & S. 544; *Carey* v. *Bright*, 8 P. F. Smith, 70.

MCDERMITT & MILLER, for defendant in error, furnished no paper book.

MERCUR, J., delivered the opinion of the court, January 4, 1875.

The question here lies within a narrow compass. The defendants' intestate owned coal lands. He entered into a written agreement with the plaintiff in error, by which, *inter alia*, the latter was to have the coal thereon, and agreed to pay therefor "the sum of ten cents for each ton (of 2,240 lbs.) of screened coal mined and removed from said lands."

In this action the defendant in error claimed to recover for the coal only which the company had actually screened and removed from the lands. The company showed that they had taken two sizes or kinds of coal. That in preparing it for market they used two screens; by the use of one they pre-

pared "lump coal"; by the use of the other, "nut coal." They denied their liability to pay for the latter, and offered to prove that it was not known among coal dealers or miners as screened coal, in the general acceptance of that term.

It is unquestionably true, as a general rule, that the meaning of a term or name given to any particular article in a trade or business, may be proved by persons engaged therein, when that term or name is used in a contract. This is admitted for the purpose of ascertaining the meaning with which the word was used by the parties. This rule of evidence is too well settled to be now controverted.

The question here, however, is as to the application of this law to the undisputed facts in the case. The plaintiffs in error did screen the nut coal, and did ship it to market. They had no right to screen and remove any coal without paying for it. If the contention was whether the company had omitted to screen and remove the largest practicable quantity of coal for market, then the relevancy of the testimony offered would be evident. So if the defendant in error had denied the right of the company to screen the nut coal, and had forbidden its removal, the evidence would have been admissible. Here, however, the company had elected and determined what coal they would screen and remove. The defendant assented to it; he accepted and ratified the act; the minds of the parties thus met; the act of the company made it screened coal in fact; the defendant confirmed it; the company is now estopped from controverting it; they can not now show that it ought not to have the name and character which their acts have given to it. Nor would evidence to prove that when the contract was made there was no market in that vicinity for nut coal, and that it did not pay the expenses of mining and marketing, change the result. Whether it was then and there in demand is unimportant. It has since been in demand and has been removed and sold. The question whether it was mined and marketed at a loss or at a profit to the company, is wholly irrelevant. The contract recognizes no such distinction. The liability of the company to the defendant for the coal taken can not be affected by it.

We see no error in the rejection of the testimony, nor in the answer and charge of the learned judge.

Judgment affirmed.

WICKERSHAM & KEITH v. CHICAGO ZINC CO. ET AL.

(18 Kansas, 481, 26 Amer. R. 784. Supreme Court, 1877.)

[1] **Knowledge of corporate agent, where agent is interested.** A principal is charged with the knowledge and bound by the acts of an agent; but this rule does not apply where, in reference to the particular subject-matter, the agent is dealing for himself with the principal. In a case where a mining superintendent sells land to his company, the company, therefore, is not chargeable with the knowledge of their agent as to the existence of an outstanding lease.

[2] **Constructive notice by record** only applies to those cases where the instrument recorded, has been properly certified (acknowledged) as required by the statute.

[3] **Lessee estopped by laches to assert his lease.** Plaintiffs, in November, 1872, took a lease, to commence January 1, 1873, for coal mining. They agreed to commence work as early as they could make the necessary preparations. They did nothing in the way of mining until June, 1874, when they sent an agent to demand possession, and one miner to commence work. In the meantime, they had been notified that their lease was canceled and the premises had been sold to a company who had expended $65,000 in the construction of works to the knowledge of plaintiffs and without assertion by them of their claim. *Held*, that they were estopped both by their delay and their conduct to assert their lease against the company.

Error from Cherokee District Court.

Action by *J. R. Wickersham* and *R. H. Keith*, against the *Chicago Zinc & Mining Company*, *J. A. C. Thompson* and *W. A. Wilkinson*. Trial at the October term, 1875, of the district court, and judgment against plaintiffs and in favor of defendants for costs. Plaintiffs bring the case here for review. The facts are stated in the opinion.

MCCOMAS & MCKEIGHAN, for plaintiffs, contended that the zinc company, at the date of the delivery of the deed to them by Thompson, knew all about the lease to plaintiffs, as he was general superintendent of the zinc company. Notice to officers and agents of corporation is notice to corporation: Angell & Ames on Corp., §§ 305, 306; 16 Md. 456; 38 Mo. 228; 19 Vt. 410.

[1] *Deep River Co.* v. *Fox*, 1 M. R. 296.

[2] *Taylor* v. *Harrison*, 47 Tex. 454; 26 Am. R. 304 and notes 309.

[3] *Clegg* v. *Edmondson*, 8 DeGex M. & G. 786; *Post* LACHES.

BLAIR & HILL, for defendants, maintained that, while it is true in some instances and under certain circumstances, knowledge of a general officer of a company is knowledge of a company, yet it is equally true that his knowledge is not the knowledge of the company in a contract of sale between him and the company where he is acting as a private individual, and where there is no community of interest between them: Angell & Ames on Corp. §§ 308, 309; 15 Denio, 337. Therefore the zinc company had no knowledge of the lease through Thompson's knowledge. Again, the company had no constructive knowledge by the record of the lease. Our statute of conveyance provides how instruments affecting real estate may be acknowledged, and how the acknowledgment shall be certified to entitle them to be recorded, and declares that when *so certified* and recorded they shall be notice to all the world.

The acknowledgment of the lease to plaintiffs, however, is not *so certified*, and the instrument was not entitled to be recorded. Hence, the record imparts notice to no one; and the defendant corporation had no actual or constructive notice of its existence, and therefore is not bound by its covenants. But even if the lease was valid and binding on all the defendants, the plaintiffs have no cause of action. This is a suit for damages, and the court says plaintiffs have sustained none.

The opinion of the court was delivered by HORTON, C. J.

On the 2d of November, 1872, Wickersham & Keith made a contract and mining lease in writing with one Wm. A. Wilkinson, who then occupied and claimed certain real estate under and by virtue of land contracts made and entered into before that time between said Wilkinson and the Mo. River, Fort Scott & Gulf Railroad Co., whereby they had a right to mine coal on said land, and to erect such houses or shelters on the land as said W. & K. might deem necessary for the convenient prosecution of the work of mining. The contract or lease was for the term of twelve years, the term to begin on the 1st of January, 1873, and also contained among other stipulations the following:

"The parties of the second part shall have the right to commence mining said coal at any time, *and they agree to do so as*

early as they can make the necessary preparations; and until they shall commence mining, the party of the first part reserves the right to mine coal on said land, but to desist when the parties of the second part shall commence mining. The parties of the second part agree to pay to the party of the first part, as rent for said land, one half cent for every bushel of coal they mine, to be paid monthly on the 15th of each month for the month previous.

"When the parties of the second part commence mining they agree to furnish the party of the first part all the coal he may need for his private use at the cost of mining same, and this sum is to be credited monthly upon the monthly payments of the parties of the second part for rent."

From the time of the signing of the lease, until in June, 1874, Wilkins neither saw nor heard from W. & K., and W. & K. took no steps to mine the land until in said June, 1874, when they sent an agent to the land, accompanied by a laborer with shovel and pick, to go to mining, and to make a demand for the premises provided they were forbidden to work.

At this time the Chicago Zinc & Mining Co. were in the possession of the premises, had their works in operation, and had expended in the construction of their works, etc., upon the premises, the sum of $65,000. After the months of January and February, 1873, had passed, and W. & K. had done nothing under the lease in the way of mining, or commencing work therefor, Wilkinson wrote to them at Kansas City, Mo., wanting to know what they were intending to do; and not getting reply from them or receiving any information, he, a few weeks thereafter, wrote them a second letter, declaring the contract forfeited. The first letter from Wilkinson was received by W. & K., but not answered; the second letter they say they did not receive. W. & K. were coal merchants at Kansas City, Mo.

In the month of June, 1873, Wilkinson got his contracts with the railroad company, embracing these premises, renewed and extended, and in September of the same year sold the premises for a valuable consideration to one J. A. C. Thompson, and assigned the land contracts with the railroad to him, and executed to him a general warranty deed, in which his wife joined.

Thompson knew, at the time of his purchase, of the lease in question. On September 12, 1873, said Thompson received from the railroad company a general warranty deed to the said premises, and paid therefor the balance of the purchase money, which Wilkinson yet had to pay. On September 11, 1873, Thompson made out a warranty deed from himself and wife to the Chicago Zinc & Mining Co. for the lands. At such time the company was not fully organized, and the deed was not delivered until the 23d of October, 1873. The Zinc Company completed its organization, so that a certificate of incorporation was issued to it on the 23d of September, 1873. After such organization Thompson turned over the land to the company for $10,000, and received paid up certificates of stock for such amount. On September 15, 1873, said Thompson was chosen general superintendent of the corporation. After all of the above transactions, W. & K. filed their petition against the Chicago Zinc & Mining Co., and Thompson, and therein demanded damages for $15,000, and that the defendants be perpetually enjoined from mining and digging coal on the said premises, and from interfering with the rights of W. & K. On the trial a jury was waived and the case tried to the court. Findings of fact were filed by the court, embodying among other things all the above facts, and on all the findings of fact, the court held that W. & K. could not recover.

The court having found as a conclusion of fact, that the C. Z. & M. Co. had no actual knowledge of the lease of W. & K. at the time of purchasing the land from Thompson, such finding is conclusive of the case, and fully sustains the judgment, unless, as the plaintiff in error contends, the company was bound by the knowledge of Thompson, its general superintendent, as to the lease, or unless the company is held to have had constructive notice of the lease through the record of the same in the office of the register of deeds.

It is undoubtedly true as a general proposition, that the principal is charged with the knowledge and bound by the acts of the agent; but this general rule, like most other rules, has its exceptions and limitations. The general rule is based upon the principle, that, as it is the duty of the agent to act upon the notice for his principal, or to communicate the information to his principal in the proper discharge of his trust

as such agent, notice to the agent is likewise legal notice to his principal. This rule applies to the agents and officers of corporations, as well as others. This general rule has no application, however, to a case in which the one party does not act as agent, but avowedly for himself, and adversely to the interests of the other. In other words, neither the acts nor knowledge of an officer of a corporation will bind it in a matter, in which the officer acts for himself, and deals with the corporation as if he had no official relations with it: Angell & Ames on Corp., §§ 308, 309; *Winchester* v. *B. & S. R. R. Co.*, 4 Md. 231; *Fulton Bank* v. *N. Y. & S. C. Co.*, 4 Paige, 127; Story on Agency, § 140. In this case, Thompson bought the land for himself and one C. F. Russell; the deeds were taken to himself, and in the transfer and conveyance of the same to the company, he did not represent the company. He was acting in behalf of his own interests and in an adversary character. His knowledge of the lease, under the circumstances, was not notice to the company of which he was an officer, unless it had been shown by proof to have been communicated to the company, or at least such facts had been established as would have been sufficient to have put the company on inquiry. In the contract or sale between Thompson and the company, he was acting as a private individual, and there was no community of interest between him and the company; therefore the company had no knowledge of the lease through Thompson's knowledge. With these views, it is unnecessary to comment upon the actual or constructive notice to Russell, and his relations with the corporation, as the conclusions we have reached as to the knowledge of Thompson not being notice to the corporation, include all that could be said as to Russell.

We must also hold that the company had no constructive knowledge of the lease, by the record thereof. It is true that it was filed for record April 14, 1873, in the office of the register of deeds of Cherokee county, and afterward recorded in that office. But it was not certified as required by sections 9, 10 and 11 of the General Statutes, page 186, and therefore did not impart notice to the company. In place of a proper acknowledgment of the lease, there is only the following:

"Subscribed to this 2d day of November, 1871.

"E. A. PERRY, Notary Public. [SEAL.]"

Section 20, Gen. Stat. 187, prescribes that instruments, *certified* and recorded as provided for in the act regulating conveyances of real estate, shall be notice to all persons of the contents thereof. As the lease was not certified as the statute directs and requires, the record of the lease imparted notice to no one.

The judgment is sustainable, going upon another proposition. There was such an abandonment of the lease by W. & K. and such a cancellation thereof by Wilkinson, and such acts and conduct on the part of W. & K., that they were estopped from asserting any right to the premises against the Zinc and Mining company, or to any claim for damages against this corporation. If a contract specifies no time, the law implies that it shall be performed within a reasonable time. In this case, while the term of the lease was not to commence till January 1st, 1873, it was specially provided, that W. & K. should have the right to commence mining coal at any time, and *they agreed so to do as early as they could make the necessary preparations*, and the said Wilkinson was to receive as rent for his land, one half cent for every bushel of coal mined, to be paid monthly. In view of all the conditions of the lease, it certainly must be apparent that the parties to the lease had in view, in making the contract, an early commencement of the mining of coal by W. & K. A long delay would have been injurious to Wilkinson, as in fact it actually was, because in the end he became deprived of his property, owing to his inability to meet his payments to the railroad company, as he relied upon the payments on the lease to obtain funds to pay installments due on his land-contracts at the date of the lease, and for the non-payment of which the railroad company had the right to forfeit his interest in the land. After waiting till the spring of 1873, and nothing having been done, Wilkinson properly wrote to W. & K. inquiring what they intended to do in the matter. They received the letter, and refused to answer. In a few weeks, Wilkinson wrote them again, declaring the contract forfeited. Nothing being attempted to be done by W. & K. under the lease, the Zinc and Mining company, in the fall of 1873, purchased the premises. When the company was commencing work, an agent of W. & K. visited the premises described in the lease,

to see what coal could be mined for, and delivered to the cars on the Gulf railroad. After examination he reported to W. & K. that it could not be mined and delivered for less than eight or nine cents per bushel, and at this time W. & K. were getting their coal delivered to them upon the same railroad from other mines at seven cents per bushel, and were able to fill all their orders they secured from the coal which they were obtaining from other mines. They watched the growth of the extensive mining works upon the land in question and the consequent expenditure of large amounts of money, making no attempt to assert any claim, and giving no notice to the company of the existence of their lease. After sixty-five thousand dollars had been expended by the company upon the land, to lay a foundation for a suit they sent in June, 1874, an agent with one man with a shovel and pick, to go to mining and make demand for the premises. They then sought to resuscitate their lease, made in November, 1872, in anticipation of immediate work thereunder. They had no right so to do. In view of their conduct to Wilkinson and to the Zinc and Mining company, they were too late in asserting any claim under the lease. It would be grossly inequitable to hold otherwise. The judgment was rightfully given. If the plaintiffs in error have been damaged in the premises, which is not apparent from the record, the result comes from their own *laches*, and for such acts innocent parties should not suffer.

The judgment will be affirmed.

All the justices concurring.

PATTERSON v. HITCHCOCK.

(3 Colorado. 533. Supreme Court, 1877.)

[1] **Essential elements of estoppel—Representations by adverse claimant to intending purchaser.** The owner of the American lode made application for United States patent. The owner of the Bull of the Woods lode filed his adverse claim, and brought ejectment to support

[1] *Griffith* v. *Wright*, 6 Colo. 248.

it. The surface plats showed an interference or crossing. Prior to such application an agent of such owner of the American lode, who was then about to purchase the same and was investigating the title, inquired of the owner of the Bull of the Woods whether he knew of any other claims that conflicted with such American lode? He replied that he did not unless it were the Inter-Ocean (a lode not in controversy). At the same time such agent remarked that his, plaintiff's, Bull of the Woods claim crossed the American, but that he understood it was a later location; to which such owner of the Bull of the Woods assented: *Held*, 1. That the first reply above stated was a false representation of fact, if the Bull of the Woods claim then existed, and that failure to assert a seniority to the Bull of the Woods title was a concealment of a material fact amounting to a representation as to a material fact; 2, that the presumption was that such owner of the Bull of the Woods had full knowledge of the facts relating to his own title, unless the contrary was affirmatively shown, which accordingly brought the case within the rule that false representation to amount to an estoppel must be made with knowledge of the facts.

[1] **Idem—Mining titles extrinsic to the record—Relation back to discovery.** 3, that although both lodes were at the time recorded, but under a law which only required the record to state "the general course of the lode as near as may be," the record did not necessarily show the interference. and that therefore the owner of the Bull of the Woods could not escape an estoppel under the rule excepting cases where the real title is equally well known to both parties; nor could the record show which was the prior or senior title, as the older record may have been founded upon a prior discovery or *vice versa*, and while both location and record of one lode might be senior to the location and record of the other, if the date of discovery, which does not appear of record, were junior, such senior record and location would avail nothing against such senior discovery, discovery being the inception of title.

[2] **The effect, not the intent, material.** If the effect of representations was to work a fraud, by inducing the inquirer to make a purchase which he would not otherwise have made, the actual intent of the speaker can not be material.

Limit of time for sinking discovery shaft—Reasonable time as a question of law. What is to be regarded as a reasonable time for sinking a discovery shaft, when the facts are undisputed, is a question of law; but if the question is submitted to the jury with the instruction that ninety days is not a reasonable time in which to sink it, the discoverer can not complain if the limit thus fixed would, under the testimony, admit of a finding in his favor.

[3] **Presumption that the location covers the vein.** A location of a lode mining claim will be presumed to include the vein upon which the discovery was made, until the contrary appears.

[1] *Miller* v. *Taylor*, 6 Colo. 41.
[2] *Morgan* v. *McKee*, 3 M. R. 129.
[3] *Armstrong* v. *Lower*, 6 Colo. 393, 581.

[4] **Departure of vein from side lines.** But when the vein has been proved to leave the lines of the location in fact, the location beyond such point of departure is defeasible, if not void, both as to the vein and the surface located.

Appeal from the District Court of Boulder County.

The facts are stated in the opinion. The defendants in the court below had judgment.

W. A. HARDENBROOK and HUGH BUTLER, for appellant.

BELFORD & REED and W. R. GORSLINE, for appellee.

ELBERT, J.

On the 16th day of August, 1875, the appellee made application at the United States land office for a patent for the "American" lode.

Thereafter, and within the time limited by law, the appellant filed an adverse claim as owner of the "Bull of the Woods" lode.

This was an action of ejectment brought by the appellant against the appellee to recover the possession of the ground embraced within the side lines of the two lodes at their intersection.

At the trial in the court below, a question of estoppel was presented, arising out of representations made by appellant pending negotiations for the purchase of the American mine by the appellee.

Touching the estoppel which the appellee sought to establish, the court instructed the jury as follows:

"If you believe, from the proof in the case, that the defendant, by his agent, Smith, applied to the plaintiff, Patterson, for the purpose of ascertaining whether the plaintiff claimed any interest in, or knew of any lode claimed by him that would conflict with the title of the American mine, and the plaintiff knew that the defendant contemplated purchasing the American mine, it was his duty then to assert his claim, if he had any, to any property the defendant was about to purchase; and if the plaintiff had full knowledge of the matters inquired

[4] *Johnson* v. *Buell*, 4 Colo. 557; *Post* LOCATION.

about and failed then to assert his claim, and the defendant, or his agent, was influenced to purchase the American mine by what the plaintiff said at that time, he is estopped from asserting such claim against the defendant at this time; that is, he is concluded by his declaration or conduct, which has influenced the conduct of another to his prejudice. The rule being that when one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, whereby he is induced to act on that belief, so as to alter his own previous position, such person is concluded from asserting against the other a different state of things as existing at the same time. There must be a representation or concealment of material facts. The representation must be made with knowledge of the facts. The party to whom made must be ignorant of the truth of the matter. It must be made with the intention that the party to whom made should act upon it. The other party must have been induced to act upon it."

The giving of this instruction is assigned for error.

In cases involving the title to real estate, the doctrine of estoppel by conduct rests upon the broad principle of equity, that one who encourages by representations, or even stands by and sanctions the acquisition of land by another, will be estopped to defeat the purchase by afterward asserting title in himself.

The *intent* of the doctrine is to restrain fraud, and compel good faith and fair dealing, and in this view it is to be rigidly enforced.

The *effect* of the doctrine is to withdraw title to realty from the operation of the Statute of Frauds, to leave it resting in parol, to preclude its assertion by evidence less conclusive, less certain, and more liable to the taint of human imperfections than the written evidence required by the statute; and, in this view, its enforcement should be carefully guarded and unhesitatingly refused, except where all the elements of an estoppel are present.

The instruction complained of, so far as it gives the essential elements of an estoppel, follows the language of Mr. Bigelow: Bigelow on Estop. p. 437. 1. There must have been

a representation or concealment of material facts. 2. The representation must have been made with *knowledge* of the facts. 3. The party to whom it was made must have been *ignorant* of the truth of the matter. 4. It must have been made with the *intention* that the other party should act upon it. 5. The other party must have been induced to act upon it.

The second and fourth propositions must be accepted as qualified by the authorities. The second is true unless the party making the representations was bound to know the facts, or ignorance of them was the result of gross negligence: Big. on Estop. 476, and cases there cited.

The fourth is true with the qualification that gross and culpable negligence upon the part of the party sought to be estopped, the *effect* of which is to work a fraud on the party setting up the estoppel, supplies the place of intent: *Henshaw* v. *Bissell*, 18 Wal. 271; 3 Wash. Real Prop. 80.

The omission, however, of these qualifications was in the appellant's favor, and he can not be heard to complain of the instruction on this ground. If the evidence supplied, or tended to supply, these five essential elements of an estoppel, the court was warranted in submitting the question to the jury, and the instruction given, with the above modifications, correctly stated the law.

Let us inquire if the evidence warranted the submission.

First. Was there a representation or concealment of material facts?

In the conversation had between Smith and Patterson just prior to the purchase of the American mine by Hitchcock, and pending the negotiation therefor, Smith testified that he, acting as the agent of Hitchcock, inquired of Patterson if he knew of any other claims that conflicted with the American. Patterson replied that he did not, except, possibly, the Inter-Ocean lode. This was a false representation, if the claim which Patterson *now* sets up had *then* any existence. "At the same time," Smith testifies, "I remarked to him that his 'Bull of the Woods' claim crossed that (the American), but I understood that to be a subsequent location. I can not give his reply to that, but I know he assented to it. He did not claim to me that there was any conflict between the Ameri-

can mine and the Bull of the Woods." Upon Smith's assertion that the Bull of the Woods claim was "a subsequent location," Patterson's failure to claim otherwise, if he did so claim, was a concealment of a material fact. Smith, however, testifies to an actual assent replied (though he does not remember the words of the reply), and this amounted to a representation as to a material fact.

Second. Was the representation made with knowledge of the facts?

There is no claim, nor is there any foundation for saying, that Patterson had not full knowledge of the questions to which he spoke. The facts inquired of rested peculiarly within his own knowledge. The presumption is, that every one is acquainted with his own rights, if he have reasonable opportunity to know them.

Third. Was the party to whom the representations were made *ignorant* of the *truth* of the matter?

Upon this question there is more difficulty. The certificate of location of each lode was of record, and to these records both agent and principal had access equally with Patterson. The appellant insists that the case comes within the rule that "where the condition of title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Undoubtedly this is the rule where the record discloses the title, as is the case generally, with patented lands: *Brant* v. *Virginia Coal & Iron Co.*, 3 Otto, 337. But the record of the certificate of location of a mining claim required by law, does not necessarily disclose the title —nor did it in this case. The law prescribes that the certificate shall contain, 1st, the name of the lode; 2d, the name of the locator; 3d, the date of location; 4th, the number of feet claimed on each side of the center of the discovery shaft; 5th, the general course of the lode, as near as may be. This, however, gives the purchaser no information respecting conflicting claims. For this he is dependent on examination and inquiry. If a conflicting claim be ascertained, the record still does not necessarily disclose the better title. Location and record still relate back to the date of discovery for the inception of title. Location and record may both be prior to those of a cross-lode, and still the latter be the older and better title,

by reason of an earlier discovery, perfected within the statutory time, of which the record gives no information.

In the case at bar, the date of the certificate of location of the American mine was June 16, 1874; of the record, June 29, 1874. The date of the certificate of location of the Bull of the Woods lode was July 11, 1874; of the record, July 13, 1874. In the body of this certificate the location is stated as April 17, 1874.

This record did not disclose any condition of title upon which Smith, as the agent of the purchaser, Hickcock, could rely. It was for him still to inquire as to the date of discovery of the respective lodes, and as to whether the requirements of the statutes respecting discovery, discovery shafts, location and record, had been complied with.

Having reference to the record, therefore, this was not a case where the condition of title was known to both parties, or where both had the same means of ascertaining the truth respecting it. To ascertain priority of right as before stated, Smith was dependent on examination and inquiry. Under the circumstances, he properly applied to the appellant for information touching his cross-lode, the Bull of the Woods.

If the priority of right which the appellant claims has any foundation *now*, it must have had existence *then*, and that, too, within the knowledge and intent of the appellant; and knowing that Smith was negotiating for the purchase of the American lode, every principle of good faith and fair dealing required him to then make known his claim.

Fourth. As to the actual intent of the appellant in making these representations, we need not inquire. If their effect was to work a fraud, it supplies the place of intent to defraud. Under the circumstances, he must have contemplated his representations would be relied upon. It was not to be expected that he would make a false admission adverse to his own interest.

Fifth. Was the other party *induced* to act upon the representations?

Smith testifies: "If he (Patterson) had said he had any claim there, I should not have paid the money until that was settled."

This is but a summary of the evidence on the points, but it is sufficient for our purpose; and we think there was sufficient to warrant the court in submitting the question of estoppel to the jury.

To every essential element of an estoppel there was more or less evidence. Of the weight and conclusiveness of this evidence the jury were the judges.

The instruction of the court by which it was submitted, as we have seen, was more favorable to the appellant than, under the law, he was entitled to ask.

We find here no ground for reversal.

It is claimed that the court erred in instructing the jury that "ninety days was not a reasonable time to occupy in sinking a discovery shaft, in the manner and to the depth required by law." The instruction was as follows:

"The discoverer of a lode, by virtue of that discovery, becomes entitled to a reasonable length of time in which to perfect the work required by law; and for that time he is permitted to retain possession of the property without interference; and the law protects him in his possession while the work of development goes on as well as after the development is completed; but, in the mean time, his work must progress with reasonable diligence. The discovery of the plaintiff's claim was made prior to the time the act of February 13, 1874, took effect, which was on the first day of June, 1874. That act provides that the discovery shaft shall be sunk within sixty days from the date of the discovery. The legislature seemed to consider sixty days a reasonable time for the discoverer of a lode to complete the work of sinking the shaft, and I instruct you that if the plaintiff discovered the Bull of the Woods lode on the 17th day of April, A. D. 1874, the law required that he should proceed to sink his discovery shaft with reasonable diligence and within a reasonable time; ninety days is not a reasonable time to occupy in sinking a discovery shaft, in the manner and to the depth required by law."

What is to be regarded as a reasonable time, when the facts are undisputed, is a question of law: *Wiggins et al.* v. *Burkham*, 10 Wall. 129; *Leaming* v. *Wise*, 73 Penn. 175;

Morgan v. *McKee*, 77 Penn. 228; *Druse* v. *Wheeler*, 26 Mich. 195; *Nudd* v. *Wells*, 11 Wis. 426.

If the court erred at all in this case, it was in submitting the question of reasonableness of time to the jury. There was no dispute about the facts upon which it was to be determined. They were a part of the appellant's own showing. He fixed the date of his discovery on the 17th of April; the commencement of work on the discovery shaft, in the latter part of June; his witness, Veale, fixed it about the middle of June; the completion of the shaft was fixed by both on the 11th of July. The shaft was five feet wide, nine feet long, and ten feet deep; the time occupied in sinking it was, at most, twenty-five days; the time from the date of discovery to the completion of the shaft was eighty-five days; the time from the date of discovery to the commencement of work on the shaft was about sixty days. Upon these undisputed facts, the question whether the appellant had completed his discovery shaft within a reasonable time, was a question of law for the court.

Had the evidence shown or tended to show that the delay in sinking the shaft was the result of extraneous circumstances—such as personal disability, inaccessibility of the lode, obstructions by heavy snow or other impediments—then the question of reasonableness of time would have been for the jury, under the instructions of the court. But the evidence presented no features of this character, requiring the aid of a jury. Nevertheless the court submitted the question to the jury, instructing them that ninety days was not a reasonable time. This limitation did not preclude the jury from finding that eighty-five days was a reasonable time, if such had been their opinion. The court having the undoubted right to determine the question absolutely, the appellant can not be heard to complain that it fixed a limit that permitted a finding in his favor by the jury.

The law contemplates that the discoverer of a lode shall prosecute the work of sinking his discovery shaft with, at least, ordinary diligence.

The time reasonable in which to do a given work, as a matter of law, must be referred, measurably, to the time necessary to do it as a matter of fact. Since, as a matter of fact, it

took twenty-five days to sink this shaft, it is difficult to see why, as a matter of law, a reasonable time in which to do it, would be eighty-five days. Such a period exceeds any possible time required by reason or necessity.

It appears in evidence, that during this period, the appellant did sink a cross-cut of about equal dimensions at another point on the lode; and had he sunk a third shaft of equal size, he would still have had ten days in which to have had a fourth well under way. Under all the circumstances, we think it was a matter of grace to the appellant that the court left the question to the jury, under an instruction that did not preclude a finding in his favor.

The mistake of the court in stating that the act of 1874 went into effect on the 1st instead of the 16th of June, was immaterial. The appellant's discovery was prior to either date, and whether the act went into effect on the 1st or the 16th was indifferent.

Error is assigned upon the refusal of the court to give the following instruction:

"It is essential to a mining claim that it should be made upon the line of a lode; and it is therefore incumbent on the defendant in making out his defense to show that the vein of the American mine runs into or through the ground in controversy. If he has offered no testimony to show that the vein of the American lode enters or passes across the territory of the Bull of the Woods location, and there are no other proofs in the case from which you can find that fact, the defendant must fail, and the plaintiff would be entitled to a verdict."

Error is also assigned on the refusal of the court to admit evidence to show that the American lode did not cross the Bull of the Woods lode, although the location crossed it.

There was no error in refusing the instruction.

When a locator has shown a compliance with the requirements of the law in making his location, he is entitled *prima facie* to all the rights which the law attaches to a valid location.

The extent to which a location must be *on* a lode in order to its validity *prima facie*, is fairly measured by the extent

to which it is necessary to show it on the lode in order to entitle the locator to stake his boundaries, make his record, and if he desires, perfect his title by patent.

The refusal of the court to allow the appellant to show that, although the American location crossed the Bull of the Woods lode, the American vein or lode did not cross it, presents a more difficult question.

May a location *prima facie* valid be defeated in whole or in part, by showing a termination or departure of the vein at some point within or along the side lines of the location?

The evidence of Van Wittering respecting the underground workings, within the limits of the intersection of the two locations, did not connect the workings with the American lode, or show its actual presence; much less did it show that the American vein extended to or across the vein of the Bull of the Woods.

The question presented is, therefore, unembarrassed by any question of fact. Both locations are made under the act of 1872. It will be observed that the rights secured by section three of the act attach to the locations made, in the language of the section, "*on* any mineral vein, lode or ledge." To arrive at the intention of the legislature we must consider the act as a whole; accepting the broader or doubtful expressions of one section, as limited or explained by other sections. The term "*on* any mineral vein, lode or ledge," must be read in the light of the requirements of section two of the act. This section limits the location to 1,500 feet in length, "along the vein or lode," and declares that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface."

These provisions are plain and explicit, and require, not in express terms, it is true, but by necessary implication, that the location should be on the lode the entire extent of the 1,500 feet. With a location off the lode, compliance with the law would be impossible in the matter of width, as the basis of measurement provided by the law would have no existence. By necessary implication, the work requisite to fix the course and position of the lode was also contemplated in order to enable the locator to embrace it within the lines of his location. These requirements interpret the expres-

sion, "on a vein or lode," as used in section three of the act. They afford undoubted evidence that this was the character of location to which it was intended that the rights conferred by the section should attach.

It is claimed, however, that a mislocation, however it may affect the miner's right to the lode located, will not affect his right to the surface ground either in whole or in part; that under the act of 1872 the surface ground is not a dependent grant.

Under the act of 1866, "surface ground was allowed for the convenient working of the lode or vein, and for no other purpose."

Such is the language of Justice FIELD, in the case of *The Eureka Mining Company* v. *The Richmond Mining Company*, 4 Saw. 302. Under this act the right to surface ground was clearly dependent upon the right to the lode located. It failing, all incidents thereto attaching would also necessarily fail.

Although the act of 1872 enlarges the rights of the locator by a grant of "all the veins, lodes and ledges, the top or apex of which lie within his surface lines," we are still of the opinion that his right to the surface ground continues dependent upon his right to the principal lode, and that his right to other lodes within his surface limits is equally dependent.

This enlargement of the rights of the locator was doubtless intended to stimulate his enterprise by increasing his reward; but the controlling reason was to prevent the controversies which were constantly arising respecting veins and lodes connected or associated with the lode claimed. These controversies obstructed the full and proper enjoyment of the principal lode granted, and the design was to settle and prevent them.

In this, and in the case of surface ground, it was intended to grant that which was associated with the principal lode, by proximity, within prescribed limits. When this association ceases, in the case of surface ground, the reason for granting it ceases.

A *mineral vein or lode* is a leading term in both acts. There must be a lode discovered and appropriated by compliance with the requisites of location. This is the prominent

and pronounced subject of the grant. This was what the miner had discovered, and claimed by right of discovery. The security of his title thereto was the practical necessity with which the act dealt; all else, we think, incident thereto; under the act of 1866, the right to the surface ground; under the act of 1872, both the right to the surface ground, and to other veins, lodes and ledges.

The principal lode constitutes the measure of the miner's right to the surface ground, as the surface ground when thus determined, in turn, constitutes the measure of his right to other veins, lodes and ledges, subject to the express limitations of the law.

It follows, therefore, that if the lode located terminates at any point within the location, or departs at any point from the side lines, that the location beyond such point, and to that extent, is defeasible if not void.

Whether after the issuance of a patent, a judicial investigation may be had, which might ultimate in annulling so much of a mining location as was not made in accordance with the provisions of law, presents a different question, which we do not decide.

The court erred in rejecting the offer of evidence to show that the American lode did not cross that of the Bull of the Woods, within the limits of the ground in controversy.

Had the plaintiff been able upon the trial to show this fact, it is clear that the defendant could not have insisted upon the estoppel which he claimed, as there would be no subject-matter to which it could apply. It is equally clear that while the plaintiff's location might not have been good as against a prior location of the American mine, still his right to recover the premises, in the absence of any valid location by the defendant, would rest upon very different considerations.

Judgment reversed, and case remanded for further proceedings according to law.

Reversed.

STEWART ET AL. V. MUNFORD.

(91 Illinois, 58. Supreme Court, 1878.)

Claiming property after assisting in leasing it. The lessee of a mine after making certain expenditures, surrendered his lease to the lessor to enable him to lease to another, but this intended new lease was never consummated. Afterward, and when the improvements were partly burned, the lessee said he was unable to take and work the mine, and requested the lessor to do the best he could with the property, and assisted in procuring another to take a lease without informing him of his claim to the machinery: *Held*, that the original lessee was estopped from claiming his improvements of the second lessee, or compensation therefor, in the absence of any agreement to pay for the same.

Effect of surrendering lease. Where a lessee of a mine makes a written surrender of his lease in view of a contemplated sale of his improvements and machinery, to enable the lessor to make a new lease to the purchaser, the original lease in law, if not in equity, is canceled, and the lessor re-invested with the legal title to the term, and, without any new writing to restore the term, the lessor may again lease and pass the legal title, free from the claim of the first lessee.

Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

F. C. SMITH, for the appellants.

F. S. MURPHY and F. A. WILLOUGHBY, for the appellee.

WALKER, J., delivered the opinion of the court.

It appears that on the 16th of November, 1872, Munford, the appellee, leased, for the term of fifteen years, of S. G. Dean, a tract of land for mining purposes. Appellee entered under the lease, sunk a shaft, ran some entries, put in machinery and erected a building above ground, at an expense, as he claims, of over $3,000. He sold his lease, machinery, etc., to an agent of the Lathrop Coal and Mining Company for $2,000, of which $300 was paid in hand, and the papers were drawn, executed, and were to be delivered within ten days, but the Lathrop Coal and Mining Company repudiated the contract before the expiration of that time, on the ground that their agent had exceeded his authority.

When this sale was made to that company, the lease to

and pronounced subject of the grant. This was what the miner had discovered, and claimed by right of discovery. The security of his title thereto was the practical necessity with which the act dealt; all else, we think, incident thereto; under the act of 1866, the right to the surface ground; under the act of 1872, both the right to the surface ground, and to other veins, lodes and ledges.

The principal lode constitutes the measure of the miner's right to the surface ground, as the surface ground when thus determined, in turn, constitutes the measure of his right to other veins, lodes and ledges, subject to the express limitations of the law.

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Reversed.

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Effect of surrendering lease. Where a lessee of a mine makes a written surrender of his lease in view of a contemplated sale of his improvements and machinery, to enable the lessor to make a new lease to the purchaser, the original lease in law, if not in equity, is canceled, and the lessor re-invested with the legal title to the term, and, without any new writing to restore the term, the lessor may again lease and pass the legal title, free from the claim of the first lessee.

Appeal from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

F. C. SMITH, for the appellants.

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When this sale was made to that company, the lease to

Munford contained covenants to which its agent objected, and that the objection might be obviated, Munford surrendered his lease by written indorsement thereon to Dean, and a new lease was made to the company omitting the objectionable covenants.

Munford brought suit against the Lathrop Coal and Mining Company to recover the balance of the purchase money, but failed to recover. When the lease was executed to the company, Dean took possession, as appellee claims, under an arrangement between them that Dean should hold it and turn it over to the company if they should accept it, or if not, then to return it to him. After Dean took possession a fire occurred which destroyed the building and machinery.

Soon after this, Dean, who was claiming the mine, got Munford to see appellants and deliver to them a letter written by Dean, who had previously conversed with Stewart in reference to leasing the mine to him, and to induce Stewart to lease the mine. It is claimed by Munford that Stewart in this conversation agreed that if he and McFarland should lease the property they would pay him for his improvements what they were worth. It was soon afterward discovered that Dean had no title to the property, but the title was in his wife; and on the 15th of July, 1873, appellants took a lease from Dean and his wife for the mine, and went into possession under it. The lease contains this clause: "Also the shaft already dug upon said premises, with the coal cars and everything else situated upon the following described premises." Munford, after he failed in his suit against the coal company, demanded the premises of appellants, and they refused to surrender them, and thereupon he brought suit in equity against appellants and recovered a decree for $1,700, which was reversed in this court on the ground that equity had no jurisdiction.[1] He thereupon instituted this action of assumpsit. Appellants filed a plea of the general issue, and on a trial the jury found for plaintiff a verdict of $2,500, but the court required a remittitur of $1,300, which was made, and the court rendered judgment against defendants for $1,200 and costs. The case is brought to this court on appeal.

On reading the evidence contained in this record, we find it

[1] *Stewart* v. *Mumford*, 80 Ill. 192.

impossible to concur in the conclusion reached by the jury. They, it seems to us, misapprehended the entire force and effect of the testimony. It stands admitted that appellee, when it was supposed that a sale was made to the coal company, made a formal surrender of his lease to Dean. This is not only not disputed but is conceded. This, then, vested the legal title to the term, if any existed, in Dean, whatever may have been the purpose or understanding of the parties. Nor is there the slightest pretense that any writing was ever afterward executed to revive or restore the term in appellee. By the written surrender, the lease, in law if not in equity, was canceled, and all of appellee's legal rights were terminated. And as a verbal lease for a term of more than one year would have been void under the Statute of Frauds, any verbal agreement, at the time of the written surrender or afterward, being void, failed to vest any legal title in appellee. If he had any rights they were equitable.

When, therefore, the property was destroyed by fire and appellee said to Dean that he was wholly unable to repair, and could not go on under the lease, and that Dean should do the best he could, that was a surrender of all equitable claim to the lease or the premises. If he could reserve an equitable interest in the lease by a verbal agreement, it must follow that by the same character of contract, he could surrender that interest. It could not require a higher degree of evidence to surrender and cancel, than to create the interest. This must be obvious to all persons in the profession.

Then, did he so surrender the interest which he claims he reserved by verbal agreement with Dean? Of this we think there can be no question. He admits that he said to Dean he was unable to repair, or perform the requirements of the lease after the fire, but says he does not remember saying to Dean to do the best he could with the property. But Dean swears he did and is corroborated by his son and by Curry. The latter says appellee said in his presence and a number of others, after the fire, that he had surrendered the lease to Dean. We must, therefore, conclude that he did surrender it in the manner Dean swears he did. This is more probable from the fact that he was then looking to the Lathrop Coal and Mining Company for pay for his improvements. Dean's son testifies

that appellee said to his father he was unable to repair and go on under the lease, and would prefer to look to the company. He was then pressing his suit against the company, and it is unreasonable to believe that he would then, or at the time Dean leased to appellants, make claim to property he claimed to have sold to the company and for which he was endeavoring to recover the price. He could not be presumed to make such a claim which, if proved, in the suit with the company, would have inevitably defeated a recovery. Such a claim would have been fatal to his interests in that case.

The property, it is conceded, belonged to the wife of Dean. That being true, it may be seriously doubted whether appellee acquired any legal rights by the lease to him. There does not appear from the transcript, so far as we have been able to find, any evidence that in making the lease Dean was acting by authority of his wife, or that she in any wise recognized his authority or ratified the act. But we shall pass this question, as the point is not made or discussed in argument.

The evidence is, we think, overwhelming, that appellee, in his first interview in reference to appellants leasing from Dean, and his next, on the day and before the lease was signed, or on that of the day after, made any claim of ownership or claim for the property or improvements. Appellee does say, in direct examination, that Stewart said he ought to be paid for his improvements if he failed to recover of the coal company, and it was agreed he should be paid what they were worth. But in his cross-examination he says he made no claim therefor. How is it possible to believe appellants, without any claim, would agree to pay so large a sum? It is too improbable for belief. And it could not be that he would make such a claim and thereby endanger a recovery from the coal company. Both of appellants swear unequivocally that he did not make such claim, nor does he swear that he did. They both positively deny they ever promised to pay him. From the evidence we are abundantly satisfied that he made no such claim before the lease was executed, nor until after he had failed in his suit against the Lathrop Coal and Mining Company, or that appellants promised to pay him anything.

If, as it appears, he made no such claim, and they did not

promise to pay him before they leased the property, it would be monstrous injustice to permit him to recover when he urged them on to take the lease, supposing, as the lease said, they were obtaining the shaft, coal cars and everything else on the premises. The law is not subject to the reproach that a man may withhold such information when he is apprised of the intention of parties to so act, and he urges them to do so, and still recover for what he knows they supposed they were purchasing and were getting with an unincumbered title. Common honesty required him to assert his title or to be forever estopped from asserting his claim.

We are clearly of opinion that appellee has failed to establish any ground for a recovery.

The judgment of the court below must be reversed.

Judgment reversed.

MEYENDORF ET AL. v. FROHNER ET AL.

(3 Montana, 282. Supreme Court, 1879.)

Pleading former judgment—Outstanding title. In pleading a judgment as an estoppel to an action or allegation, it must be made to appear that precisely the same point was in issue at the former trial, as that now in question, or there can be no estoppel; hence a party who is ousted from the possession of a mining claim under one title is not estopped from purchasing another outstanding title to the same property and asserting title under that.

[1] **Relocating claim the title of which is doubtful.** The acquiring of mining ground by location is procuring such right by purchase; and one in possession of mining property under a title determined in court to be invalid can not be charged with fraud because he relocated the same before such determination; he stands in no different condition than one who buys an outstanding title.

Subsequently acquired title. The doctrine that asserts that the subsequently acquired title of one man inures to the benefit of another, applies only where the latter is a purchaser of a title from the former, and not to a case where the title is acquired by judgment.

[2] **False representations—Estoppel in pais.** To constitute an estoppel *in pais* for alleged false and fraudulent representations it must appear 1. That there were representations concerning material facts. 2. The repre-

[1] *Weill* v. *Lucerne Co.*, 3 M. R. 373.

[2] *Patterson* v. *Hitchcock*, M. R. 542.

sentations must have been made with the knowledge of the facts. 3. The party to whom they were made must have been ignorant of the truth of the matter. 4. They must have been made with the intention that they should be acted upon. 5. They must have been acted upon.

[1] **Fraud in obtaining patent.** A patent which has been obtained from the United States by fraud can only be attacked by the United States.

Defenses should be separately stated. Each defense should be complete in itself and a cross-complaint should be separate from the other defenses.

Trustee and cestui que trust. A party who seeks to have another, who has secured a patent title by alleged fraudulent means, adjudged a trustee of such title for his use, must first show himself entitled to a patent from the United States upon his equitable title.

Defendant may prove title under the general issue—Demurrer does not admit surplusage. The defendant may, under the general denial, give in evidence title in himself; the allegation of such title in the answer does not constitute new matter nor present a new issue, but is only surplusage, and is hence not admitted by a demurrer to the answer.

Appeal from District Court of Jefferson County. First Judicial District.

This cause was tried in the court below by BLAKE, J. The appeal was taken from the judgment of the court sustaining the demurrer to defendants' answer.

The facts are sufficiently stated in the dissenting opinion of WADE, C. J.

E. W. & J. K. TOOLE, for appellants.

CHUMASERO & CHADWICK and SANDERS & CULLEN, for respondents.

KNOWLES, J.

The first proposition I shall consider in this case is: Was the demurrer to the new matter set forth in the defendants' answer properly sustained? The demurrer is in effect, that the new matter set forth in the answer, in no light in which it can be properly viewed, presents a proper defense to plaintiff's complaint. The first defense is that of an estoppel by judgment record. To sustain this, the answer alleges that the defendants, Frohner and Barta, located and become the

[1] *St. Louis Co.* v. *Kemp*, 104 U. S. 636; *Post* PATENT.

owners of, by location, certain mining claims, known and described as the Cannon and the Cannon Extension claims; that John Rogers and others located the same ground as the "Star of the West" lode, and went into the possession of the same; that to recover the possession thereof, defendants, Frohner and Barta, brought an action which was decided in their favor, and judgment of possession was awarded them, under which the same was restored; that pending such litigation, Agno, the grantor of plaintiffs, purchased the interest of the said Rogers and others in the said "Star of the West" location, and went into possession of the said property, and undertook to defend said suit, and that he was therefore a privy in said action and bound by the judgment therein. I agree to the proposition that the said Agno, under this state of facts, is estopped from setting up any claim or interest he may have acquired in the "Star of the West" location from the said Rogers and others.

But it does not appear that the title in dispute in the case is that derived from the "Star of the West" location. In Big. on Estop. 523, I find this: "But in pleading or replying a judgment as an estoppel to an action or allegation, more minuteness must be observed. It must now be made to appear that precisely the same point was in issue at the former trial, as that now in question, or there can be no estoppel."

The allegations setting forth the estoppel in this case did not show that the plaintiffs are claiming anything by virtue of the "Star of the West" location. The trial of this cause shows that the "Star of the West" location was not in issue; that the plaintiffs in the case claimed nothing by virtue of the same, but claimed title to the same by virtue of a patent from the United States. Hence the judgment in the case pleaded could not have worked an estoppel to the giving the same in evidence, and would have made no difference in this action. It is true that in the case of Barta and Frohner against Rogers and others, the right to the possession was determined, but that right in that case depended upon a different state of facts from that presented in this case. A party who has been adjudged to deliver possession of land to another claimant is not estopped from purchasing, subsequent to the action in which the right to such possession was determined,

an outstanding title, and asserting again his right to the possession of the same: *Valentine* v. *Mahoney*, 37 Cal. 389; *Mann* v. *Rogers*, 35 Id. 316; *Montgomery* v. *Whiting*, 40 Id. 294.

There is nothing worthy of much discussion in the point that the subsequently acquired titles of Agno should inure to the benefit of Frohner and Barta. They were not the purchasers of any title from Agno or Rogers *et al.* The doctrine that asserts that the subsequently acquired title of one man inures to the benefit of another, applies only where the latter is a purchaser of a title from the former. The said judgment in favor of Barta and Frohner did not make them the purchasers of any title from Rogers *et al.* or from Agno.

Each defense should be complete in itself. If a pleader does not wish to restate matters already pleaded in one defense, he should refer to such matters by appropriate words, and make them a part of any defense where he desires them to appear: Moak's Van San. Pl. 606; *White* v. *Cox*, 46 Cal. 169.

In considering the remaining issues presented by the answer, I find myself much at a loss. None of these defenses are stated separately, nor is either complete without referring to matters evidently averred and intended for another defense. The answer evidently unites several defenses, and a cross-complaint in what I think must be treated as one count. The defenses and cross-bill are not separately stated, but there was no demurrer to the answer for this reason. The defendants urge that the title of the plaintiffs had its inception in fraud of their rights; that Agno's location of the same was made while he was in possession thereof under the "Star of the West" location. This is true under the allegations in the answer, but the answer shows that this location was made subsequent to the trial of the case between Barta and Frohner and Rogers *et al.* His rights under this location could not have been determined in that case. A party is precluded and estopped by any title he put in issue in a litigation, or which he might have put in issue, and by no other: *Mann* v. *Rogers*, 35 Cal. 316. The acquiring of mining ground by location is procuring such right by purchase.

Wash. on Real Prop., Vol. 3, p. 4, says: "In one thing all writers agree, and that is in considering that there are two

modes only, regarded as classes, of acquiring a title to land, namely: descent and purchase." Certainly no one would contend that when a person locates mining ground, he acquires a right to the same by descent. He must acquire it then by purchase. The fact that Agno made a location of this mining claim, while he was in possession under the "Star of the West" location, puts him in no different condition from what he would have been, had he purchased an outstanding title otherwise than by location at that time. I have shown in the cases of *Valentine* v. *Mahoney*, *Mann* v. *Rogers* and *Montgomery* v. *Whiting*, cited above, that he may do this. And how it would be fraud to do so I can not see. It is alleged that Agno knew that defendants had the title to said ground, and that the same was not open to location. It is not necessary when a man buys in an outstanding title, for him to know that it is a valid title. And if he should not know that it was a valid title, or should know that it was not, I do not see how he can be charged with fraud. If his title was not a valid one, he would acquire nothing by it, and the person in possession of the property thus acquired would have a legal defense against the same. I have been unable to find any authority for the assertion that the person acquiring an outstanding title under such circumstances would be regarded as having committed a fraud even if he knew he had not procured the valid title by such purchase. The fraud, alleged to have been practiced by Agno upon the defendants in preventing them from contesting his application for a patent, will be considered under the plea of estoppel *in pais*. Taking the whole answer together, can there be enough extracted from it to show such an estoppel? The gist of the matters which can be treated as such a defense, are the alleged false and fraudulent representations of Agno. For Agno and those in privy with him to be estopped by these it must appear: First, that there were representations concerning material facts; Second, the representations must have been made with the knowledge of the facts; Third, the party to whom they were made must have been ignorant of the truth of the matter; Fourth, they must have been made with the intention that they should be acted upon; Fifth, they must have been acted upon: Big. on Fraud, 438; Kerr on Fraud and Mistakes, 93; *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 279.

There is no allegation in the answer that the representations of Agno were made with the intent that the defendants should act upon the same. To have set up a complete defense of estoppel *in pais*, the answer should have contained such an allegation: Moak's Van Sant. Pl. 336.

There are certain allegations of fraud in the answer which tend to establish a fraud upon the United States by Agno, in procuring a patent to the ground in dispute. For this only the United States can attack the said patent: *Mowry* v. *Whitney*, 14 Wall. 434; Wash. on Real Prop., Vol. 3, p. 180; *Field* v. *Seabury et al.*, 19 How. (U. S.) 323. From the brief of appellants it appears that this answer should also be treated as a cross-complaint. A cross-complaint should certainly be set forth separate and distinct from those portions of the answer which are intended for defenses, and should be complete in itself. In order to find anything approaching a cross-complaint in this case, portions of the answer must be referred to which were evidently intended for such defenses, as estoppel of record and estoppel *in pais*.

There is nothing in that portion of the answer intended for a cross-complaint which sets up title in the defendants, and I will have to refer to these allegations setting up an estoppel by record to find such allegations. But as the point was not distinctly raised by the demurrer, I will consider the whole answer, and determine whether or not sufficient is alleged therein to entitle the defendants to the relief asked. The relief asked is a declaration that defendants and not Agno were entitled to a patent from the United States, to the ground in dispute, and hence Agno occupied but the place of the United States and was only a trustee of the legal title for the benefit of these defendants; and the plaintiffs having notice of defendant's equities are also but similar trustees. I am aware of and fully recognize the legal proposition that where one person has procured a patent to any portion of the public domain from the general government, for which another party is entitled to a patent, that the former may be declared a trustee for the latter and adjudged to convey to him the legal title. But this latter person must show that in equity he is entitled to this conveyance. Generally speaking he would not be entitled to this conveyance unless he was entitled to

one from the United States. The location of a parcel of mining ground in accordance with the United States law and the local laws upon the subject, does not entitle a person to a patent from the United States. He has the right to apply for a patent, and he only. It is a qualification for applying for a patent, similar to the right of citizenship, or the declaration of intention to become a citizen: Before a person, who has located a mining claim in accordance with law, would be entitled to a patent from the United States, he must make an application therefor under oath, and file therewith in the proper office of the land register, a plat and field notes of the claim, made by or under the direction of the United States surveyor-general. He shall post a copy of such plat together with a notice of such application in a conspicuous place on the claim, and shall file an affidavit of two persons that such notice has been duly posted. Then the register of the land office shall publish the fact for at least sixty days, that such application has been made. Then the applicant shall file with the register a certificate of the United States surveyor-general that five hundred dollars worth of labor has been expended, or improvements of that value put upon the claim by him or his grantors. Then there must be an affidavit that the plat or notices have been posted up on the claim during the sixty days of the publication of the notice. Then, if no adverse claim is made to the ground, the applicant is entitled to a patent thereto upon payment of five dollars per acre therefor: U. S. Rev. Sts., § 2325.

It may be that where the title has passed out of the United States, a person might not be required to do all of these things, but certainly he ought to do every one of them that could and which would be of any avail. He ought to have a survey made of the same under the direction of the United States surveyor-general for Montana.

It is true the cross-complaint shows that there was a survey made of the property by a deputy United States mineral surveyor, but it does not show that the survey was made under the direction of the United States surveyor-general. There was no certificate procured from the United States surveyor-general of Montana, showing that defendants had performed five hundred dollars worth of labor upon said claim.

There was no tender to the plaintiffs or Agno of five dollars per acre for this ground. And there is nothing to show that the defendants should be legally excused from doing these matters. In fact there is nothing in the cross-complaint which would tend to show that defendants were entitled to a patent to this ground save the mere location of the same. The cross-complaint does not show an equitable title for a patent in defendants. Do the defendants set up in the answer a legal title in themselves? I suppose what the defendants would claim as allegations showing legal title in themselves, is the clause of the answer, numbered *eleven*, which commences thus: "Defendants further charge and allege that they were and are entitled to the exclusive possession and enjoyment of, etc." The allegation that a party is entitled to the possession of real property is a legal conclusion and not the allegation of a fact: *Payne and Dewey* v. *Treadwell*, 16 Cal. 221.

There might be matter enough set up in the allegations intended for a defense of estoppel by judgment record to amount to a plea of a legal title in defendants. If there were no objection to considering this, still, under the demurrer in this case, should this be treated as new matter constituting a defense?

Justice RHODES, in the case of *Marshall* v. *Shafter*, 32 Cal. 177, holds this language: "It is proper at this point, however, to say that it is settled beyond all controversy in this State that the defendant may under the general denial give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter, and therefore the allegations of title in the defendant do not present a new issue." In this case the denials of the defendants in their answer, put in issue the allegations of title in the complaint. Under this issue the defendants could have proven anything that would have shown that plaintiffs had no title or were not entitled to the possession of said property. For this purpose they could have shown title in themselves or the right to possession in themselves. I do not controvert the proposition that when a person possessing the proper qualifications as to citizenship, locates, according to law, a mine, he receives by operation of law a grant to a mining easement to

the same, and this grant gives him the exclusive right to the possession and enjoyment of such property for mining purposes. And I am of the opinion that this grant is what may be termed a legal right, and can be introduced in evidence in an action to try the right to the possession of a mining claim, although it is opposed by a patent from the general government. A patent is nothing more than a public grant evidenced by a deed. The title to this mining easement rests upon a grant, as I have said, and is evidenced by the facts of location and the law of Congress. Whoever is prior in time where there are two grants, is prior in right. If the defendants, then, located the claim in dispute, according to law, before the grantor of plaintiffs located the same, they could have introduced the title thus acquired, in evidence in this case, under their general denial, and it would have prevailed, in determining the right to the possession against the patent of the plaintiffs. There is nothing to show, however, in the record that they ever offered in evidence any such title on the trial. The fact that defendants made allegations in their answer showing title in themselves according to the foregoing opinion in the case of *Marshall* v. *Shafter* will avail them nothing. According to that, such allegations for the purpose of showing a legal title in themselves were not new matter constituting a defense. It was only surplusage or irrelevant matter when viewed in that light. The demurrer admits only so much of the new matter as goes to make a proper defense. A demurrer does not admit surplusage or immaterial matter: Moak's Van Santv. Pl. 783. If the answer then could be considered as setting up a legal title as new matter in defense, so far it must be regarded as immaterial and surplusage.

I now come to the question as to whether or not the plaintiffs were possessed of a legal title or only an equitable one at the time of the commencement of this action. There is no motion for a new trial; no record of the evidence introduced on the trial in this case. Hence, according to the well established rules in judicial proceedings, we can not determine whether the findings of the court below were correct or not.

The cause was tried before the court without a jury, and the court finds that the plaintiffs were the owners of the premises in dispute in fee simple. We can not go behind this finding.

On the trial it appears that there were exceptions taken to the introduction in evidence of a patent to Agno, from the United States, of the ground in dispute, dated March 3, A. D. 1876, and a deed from Agno to these plaintiffs, conveying the same, dated November 23, A. D. 1875. When this patent was delivered to Agno, does not appear. There is no evidence in the record upon this point. This court can not then presume that it was not delivered to Agno before the commencement of this suit. If these deeds do not have a tendency to show a legal title in the plaintiffs, then they were improperly admitted in evidence. If they had that tendency, then they were properly received. The granting part of the deed from Agno to the plaintiffs is as follows: "The said party of the first part for and in consideration of the sum of ten thousand dollars lawful money of the United States of America, to him in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and conveyed, and by these presents does grant, bargain, sell, remise, release and convey unto the said parties of the second part and unto their heirs and assigns forever, the following described tract or parcel of mining ground."

The covenants of warranty are as follows: "And the said party of the first part, and his heirs and assigns, hereby promise and covenant the title, and peace and possession of said property to warrant and defend against the lawful claims of all persons whomsoever." Taking these portions of that deed, and there is no doubt but that it purports to convey to the plaintiffs a fee simple absolute title to the mining ground in dispute. There could be no doubt that this is the scope of that deed were it not for another recital in the deed, namely: "This conveyance is intended and does convey all the title the party of the first part now has, as well as all title he may hereafter acquire by a patent from the United States, application having been made therefor." This recital, however, does not change the character of this conveyance. It does not place any limitation upon the title it conveys. In fact it only declares what in law would be the effect of such a deed under our statute. I do not deny that, as far as the title the said Agno had to a patent from the United States, he could have

had only an equitable title to the same, and so far as that patent title was concerned the deed only conveyed his equitable title to that patent title. But that is not the question here presented, namely: What title this deed in fact did convey, but what did it purport to convey? I answer that this deed must be classed as one that purports to convey the fee simple absolute title to this mining ground, for it purports to convey a title without any restrictions or conditions. It purports to convey such an estate as would pass to one's heirs at common law, and not to his administrator.

"A fee simple title is one that excludes all qualification or restriction as to the persons who may inherit it as heirs." 1 Wash. on Real Prop. 65–66. There is no qualification or restriction as to heirs in this deed. Purporting then to convey a fee simple absolute title to this ground in dispute, what was its effect upon the patent title that Agno subsequently acquired?

Our own statute (see Cod. Sts. 401, § 32) upon conveyance of realty is as follows: "If any person convey any real estate by conveyance *purporting* to *convey* the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

The recital in the deed of Agno only declared what was the effect of the deed under this statute, as soon as Agno received the patent from the general government. As soon as Agno received the patent to this ground from the United States the legal title he so acquired, by virtue of his deed to them, inured to plaintiffs' benefit. I am not obliged, however, to rest my conclusion that the patent title of Agno, acquired by his patent, inured to the benefit of the plaintiffs, upon the section of our statute above quoted. In the case of "*The Lessees of Harmer's Heirs* v. *George Morris and David Gwynne*, 1 McLean's C. C. R. 44, one Symmes executed a deed to Harmer to certain lots in what is now the city of Cincinnati, in the year 1791. In the year 1794 Symmes received a patent from the United States to these lots with

other ground. McLEAN, J., says as to the effect of this subsequent title acquired by Symmes: "A deed having been given by Symmes to Harmer for these lots in 1791, when the patent was issued to Symmes for the same land in 1794, the deed of 1791 took immediate effect, and vested Harmer with the legal title." This case was affirmed in 7 Pet. 554; 10 Curtis' U. S. Sup. Ct. R. 558. STORY, J., upon this point used this language in delivering the opinion of the court: "That the deed of Symmes to Harmer in 1791 passed a legal title to Harmer which became consummated in the latter when Symmes obtained his patent from the United States in 1794, is not controverted." Under many decisions, according to the doctrine in estoppel, the patent title of Agno would inure to the benefit of the plaintiffs. Agno's deed to them being a warranty deed, it follows from this view that the introduction of these deeds not only had a tendency to establish a legal title in the plaintiffs, but that they did establish such title, there being nothing to show that Agno did not receive this patent before the commencement of this action. It was signed before that, and may have been and probably was delivered before that.

Whatever may be my views as to the abstract question or right in this case, and however much my disposition might impel me to do otherwise, I am satisfied that well established principles of law force me to the conclusion that the judgment in this case must be affirmed.

It is ordered that the judgment of the court below be affirmed with costs.

Judgment affirmed.

WADE, C. J., dissenting.—It is due to the importance of this case, and in view of the fact that the answer has been held insufficient, to set forth the allegations of the same more fully than has been done. The action was instituted by plaintiffs to recover possession of the Nellie Grant quartz lode claim and for a perpetual injunction enjoining the defendants from working the same. The answer in substance alleges that the defendants on the 9th day of June, 1872, located the Cannon and Cannon Extension lodes upon the unoccupied and unappropriated lands of the United States, and that they

acquired the right to the exclusive possession and enjoyment of such lodes under and in pursuance of the act of Congress of May 10, 1872. That while they were so seized and possessed of such lode claims and while the same were no longer open to exploration and occupancy by any other persons than themselves, one John Rogers, in company with John G. Keith, William Lennox and A. J. Arnold, wrongfully and unlawfully entered upon and ejected the defendants therefrom, and while so in possession relocated the same as the Star of the West lode. The defendants then instituted an action in ejectment to recover possession of the property. During the pendency of this action one Arthur B. Agno purchased of the defendants therein, who were so wrongfully in possession thereof, the Star of the West lode, and went into possession and agreed to defend the action. The cause was tried and resulted in favor of the plaintiffs (defendants herein) who were adjudged entitled to the possession of the property in question by virtue of the Cannon and Cannon Extension locations as against the defendants therein (Rogers & Company) who claimed under the Star of the West location. Thereafter by virtue of a writ of restitution the defendants in that action were dispossessed and these defendants were restored to the possession of the Cannon and Cannon Extension lodes. Thereupon an estoppel by virtue of this judgment is alleged against Rogers & Company, their grantees.

It further appears that while Agno was so wrongfully and tortiously in possession of the Star of the West lode, and during the pendency of the action in ejectment and an appeal and *supersedeas* therein, he, conspiring with Rogers & Company to defraud the defendants and to avoid the consequences of such litigation and judgment, changed the name of the property and relocated the same as the Nellie Grant lode, well knowing that the defendants at the time of such relocation were entitled to the exclusive possession and occupancy of the property and that the same was not open to exploration and appropriation, being at the time owned by the defendants. Thereafter Agno fraudulently procured Meyendorf, one of the plaintiffs, a deputy mineral surveyor, to survey the Nellie Grant lode for the purpose of procuring a patent thereto, and the plaintiffs, with the full knowledge of all the rights and

equities of the defendants, purchased the Nellie Grant lode and received a deed therefor. To aid this fraudulent design to procure a patent, and while the property was so in litigation and in the possession of Agno,and while the defendants were at the city of Helena, eighteen miles distant, attending to such litigation, the plat and notices were placed upon the property, and immediately and within five days thereafter and long before the defendants knew that the name of the property had been changed and the same relocated, it became impossible, by reason of deep snows in the mountains and extreme cold and stormy weather, to obtain access to the property and make survey of the same, if an adverse claim became necessary.

Agno represented to the defendants that the Nellie Grant lode did not embrace any of the Cannon or Cannon Extension lodes, and the survey of the Nellie Grant lode, as shown by the field notes and official plats on file in the surveyor-general's office do not show the *locus* of such claim to interfere with or to embrace any of the Cannon or Cannon Extension lodes, all of which records, survey plats and field notes were so done and executed for the purpose of deceiving and defrauding the defendants, who were at the time ignorant of such design and relied upon such representations.

While Agno was thus wrongfully and tortiously in possession of the property and wrongfully excluding the defendants therefrom by virtue of false affidavits concerning his occupancy and possession of the property and his compliance with the laws of Congress and the rules thereunder, he placed himself in a position to apply for a patent to the property. The defendants, after discovering the *locus* of the Agno location, filed their *caveat* and certified copy of the judgment-roll in the ejectment case with the proper officer, who erroneously disregarded the same.

It appears that the plaintiffs procured Agno to do and perform the fraudulent act charged against him, for the purpose of fraudulently procuring a patent for the property when the same belonged to the defendants. After the defendants had been placed in possession of the property by virtue of the writ of restitution, Agno went upon the premises and tore down his notices and plat and gave them to the defendants,

and willfully and with the intent to deceive and injure the defendants said to them that he had abandoned his application for a patent, and that in the future he would lay no claim to the property, and that he had done with interfering with the property, and that he had no right to do what he had done in attempting to defeat the judgment in the ejectment action. And relying upon these representations and the good faith of the same, the defendants performed a large amount of work upon the property that they otherwise would not have done. That he also fraudulently and falsely represented that his survey and claim did not embrace the lode claims of the defendants, and that he would not and should not claim any part of the same; that these representations were made just before the time expired for the interposition of an adverse claim; that but for such representations the defendants would have ascertained the conflict as best they could (the same being then unknown to them), and interposed their adverse claim and maintained their title and obtained a patent to the property; that such representations were false and were fraudulently made to prevent the defendants interposing their claim, thereby to enable the plaintiffs to procure their patent; that the plaintiffs had full knowledge of the facts at the time they received the conveyance from Agno and are estopped from asserting the title so fraudulently obtained, which title is a cloud upon the defendants' title and is being injuriously used against them by plaintiffs, by invoking the equitable interposition of the court to grant the injunction herein.

All these facts and allegations of the answer material to the issue were by the demurrer thereto admitted, and the demurrer sustained, and this decision of the court below is by the majority opinion herein affirmed.

1. In my judgment this opinion assumes as a fact the very question to be tried in the case; it declares: "But it does not appear that the title in dispute in this case is that derived from the Star of the West location." This oracular assertion assumes as a fact the important question that the answer seeks to present for determination, and the decision seems to be based upon this assumption and the one following it, that Agno held the Nellie Grant location by a title subsequent to the judgment in the ejectment case. The question is, do the

allegations of the answer warrant these conclusions? Does not the answer conclusively show that the title under which the plaintiffs claim was derived from the Star of the West location, and was not the Star of the West title concluded by the judgment? Was the Nellie Grant title a new and subsequently acquired title? To answer these questions it becomes necessary, in the first place, to determine what effect is to be given to the judgment in the ejectment case. It is conceded that the patent to the plaintiffs' grantor, Agno, carried with it the legal title to the property, but the defendants seek to show by their answer that they are entitled to the beneficial estate therein and ask the interposition of the equitable jurisdiction of the court to protect them in their possession and award affirmative relief, should it appear proper to do so. For this purpose they first plead the ejectment judgment. That judgment was good as between the parties as to all the probative facts put in issue. It determined everything necessary to a recovery on the part of the plaintiffs in that action, who are the defendants herein. It established their right to the identical property in controversy at the time. It consequently devolved upon the respondents, the plaintiffs, to show a new title. But in making a new location or in changing the name of an old one as in this case, they can not again put the plaintiffs in that action to proof of the very matter they then litigated. They can not again call upon them to establish their location and right of possession at the time this judgment was rendered. It was between the same parties and privies, involved the right of possession to the same property, and determined that at the date of its rendition the plaintiffs in the action were entitled to the possession. Being so entitled at that time how did they lose their title, and how did the respondents acquire that by which they claim the property? As the answer discloses, by taking wrongful and fraudulent possession of the property, and while the right of possession was being tried, and during the pendency of the action for that purpose, relocating the property and changing its name in pursuance of a conspiracy to defraud the appellants and to avoid the consequences of a judgment, awarding to them the possession of the property. I am unable to see how by these fraudulent and wrongful acts the appellants lost their title,

or how a valid new title was acquired by the respondents. Of course if there was a valid new title it was not concluded by the judgment, but that is the very question presented in the answer, by showing in what this new title consisted, and how, if at all, it was acquired. Was there a valid new title acquired by respondents after the judgment? The Star of the West location was a fraud. The possession acquired thereby was tortious and wrongful. So the court adjudged in the ejectment case. But this possession so acquired was made the basis of the Nellie Grant location, without which no location could have been made by Agno, and without which no patent could have been issued to him. How is a patent to a mineral lode claim acquired? By making a lawful location, taking actual possession thereunder, and performing the necessary amount of labor thereon. Now as to the Nellie Grant location, the possession that supports it was taken under the Star of the West location and all the labor performed thereon by Agno, for all that appears, was performed while the lode was called the Star of the West lode, and as to such labor and possession they are both concluded by the judgment, and as to Agno, his grantees and privies are as if no possession had been taken and no labor performed.

And so the question is presented whether a party can suspend the rights of his adversary, and, while they are so suspended and his hands completely tied, acquire a valid and unassailable title to the very property in dispute. The Star of the West location and the possession thereby acquired being an indispensable requisite to the validity of the Nellie Grant location, it follows that if the Star of the West location was fraudulent and void, that of the Nellie Grant must be equally so, the Star of the West location being but a link in the chain of title to Agno; and if the judgment is conclusive as to the Star of the West location, it must be equally so as to that of the Nellie Grant.

The case of *Mann* v. *Rogers*, 35 Cal. 316, cited as authority in support of the title acquired by Agno under the name of the Nellie Grant lode, is not in point. It lacks the very element that renders the Agno title invalid. It does not call to its support the tortious possession without which Agno could not have acquired the Nellie Grant title. It required the unity

and use by Agno of his entry under the Star of the West title, and the retention of the possession thereunder by appeal and *supersedeas*, to enable him to lay the foundation and build up his Nellie Grant claim. It will be seen from the above case that there was at the time of the litigation between Mann and Rogers a present subsisting operative title by grant in Valligo. This title was purchased by Mann. It was an available title independent of any of the rights of the respective parties litigated in the action. In the case at bar Agno seeks to build up a right out of a possession that was being litigated and which he wrongfully held by force of the appeal. So in the case of *Valentine* v. *Mahoney*, 37 Cal. 389, referred to in the opinion of the majority of the court, the subsequently acquired title was an outstanding available title drawing with it the right of possession.

An after-acquired title may be a naked title without any beneficial interest, or a right of possession alone. In either case it is capable of being enforced in connection with the rights that are alone incident to the character of title acquired. If the same tortious possession is invoked to support the title, and without its aid one can not be produced, the claim must fall for want of legal support. Stripped of the possession upon which alone he can found the Nellie Grant title, he has nothing left. Had he been dispossessed under the writ of restitution, or surrendered the possession of the Star of the West before the litigation was terminated, he could then have relieved himself of the binding force of the judgment and established a new claim, independent of the possession held by reason of the appeal; and this is the doctrine announced in *Montgomery* v. *Whiting*, 40 Cal. 294. No one doubts but that a person in possession may buy up an outstanding title and avail himself of it. But this outstanding title must carry with it the right of possession. He can not buy up an outstanding title that is not coupled with the right of possession if he is a trespasser, for this will not aid him in defense of his possession. His tortious possession can not assist him in such a case. He can not use to his benefit the very trespass he is seeking to maintain, and thereby change the legitimate results of the controversy. He can not use the process of the court and the remedies afforded by it to hold

wrongful possession of the property, and at the same time make the possession so held the basis of requiring a superior right over his adversary. He can not make his trespass work a forfeiture, nor build up a title on such a basis. The title acquired must be a valid and available one, such that might be shown to exist in a stranger and defeat a recovery in ejectment. It must be one that carries with it the right of possession and capable of being enforced. I will give an instance that presents the present case in its true light, as distinguished from those cited by the court. Suppose A was the owner by location of the Nellie Grant lode, but had not been in possession for a year and could not under our statute maintain ejectment, but if in possession could successfully defend against such action. After his absence for a year B enters upon and takes possession of the property and subjects it to his dominion. Within a few weeks C forcibly enters and evicts B. To regain the possession thus wrongfully taken from him, he institutes his action of ejectment against C. In order to defeat this action C purchases the title of A and expects by the unity of his tortious possession with A's title to successfully defend. To allow such a doctrine to prevail, C, instead of being placed at a disadvantage by reason of his trespass, is favored on account of it, and a stale, unavailable title is made good in the hands of a wrong-doer, by the commission of a wrong. Now, as averred in the answer, this is just what Agno is seeking to do. The determination of the suit shows that his possession was tortious, and yet by appeal and *supersedeas* he makes it the sole origin of the Nellie Grant title. When we come to look for the Nellie Grant claims there is none in being until it is brought into existence out of Agno's tortious possession. By it he makes the change in the name and stakes—changes the inscriptions on the corners—procures a survey, and is enabled to make his record and apply for a patent for the identical property adjudged to belong to the defendants. If he had returned the possession he might never have been able to have secured a foothold upon the premises thus surrendered up. But if he had, and made it the basis of a new title, a new suit might possibly have been necessary to determine his right. But until this tortious possession is restored he can not lay a new foundation for a new title. He

can not build a new title upon the old foundation. The old foundation of his title, the Star of the West location and the possession thereunder, was concluded by the judgment. He was bound by this judgment so far as this location was concerned, and the Nellie Grant location being born of the Star of the West location, which had been adjudged void, was itself void: See *Atherton* v. *Fowler*, 6 Otto, 513, where the court holds that a naked, unlawful trespass can not initiate a right of pre-emption in the public lands. The trespass of the Star of the West location could not therefore initiate the right to the Nellie Grant location.

A judgment which binds the rights of the parties is as effectual as a release or a confirmation by one party to the other. It is conclusive of the right and establishes the obligation in ejectment to return the property. But for this rule successive transfers and alienations of the property would forever prevent a determination of the controversy. No one would contend that the judgment was either a bar or an estoppel to a subsequently acquired title. But the question presented here is, whether Agno, by his entry under the Star of the West title, could by appeal and *supersedeas* stay the execution of the writ of restitution, and under this entry and possession change the name of the same property and acquire a new title; we think it clear that he could not. The right of possession was the question under the laws of Congress and the territory that was litigated; so far as this right is concerned it was decided in favor of appellants. The issuance of the patent after the possession under the judgment conferred no new right in this respect, and was, under the particular facts of this case, a bare, naked legal title which did not carry with it the beneficial estate. The judgment should therefore prevail as an estoppel in a court of chancery, and operate as effectually as a release or confirmation by the patentee made prior to the issuance of the patent. That the judgment may not have been effectual before the land officer is no reason why it should not prevail in a court of chancery where the equitable rights of the parties are invoked according to the rules and practices of such tribunals. A patent may convey the bare, naked legal title while the entire equitable interest and estate may be in another; such a case would arise where by a judgment

one party is decreed to be the owner and entitled to the possession of property the title to which was in another, and that is the situation of the parties to this case. The judgment determined every right possessed by the parties anterior to the issuance of the patent and leaves the patent simply evidence of the naked legal title, while the beneficial interest in the property remains in appellants. In such cases the issuance of the patent confers no new title. It is conclusive in a court of law, but does not determine the rights of the parties in a court of equity, where the holder of the legal title may be decreed a trustee for the equitable owner. The patent issued to Agno. He obtained it by reason of his wrongful possession and perjury, while the appellants were the real owners of the property. How, then, could he obtain any beneficial interest in the property short of holding possession until a title ripened under the Statute of Limitations, which statute he could not invoke while the property and the right of possession was held by operation of *supersedeas* pending the suit as charged in the answer. If, by the operation of the *supersedeas*, Agno could hold possession and right of possession during its continuance and acquire a title because the party against whom it run could not successfully prosecute the very kind of action it is claimed the law requires, it is simply permitting the Statute of Limitations to run during the pendency of an action to determine this right. The patent is not in fact a new title. If so, in what is it founded? No new entry was made. The old one alone is its basis. It had never been surrendered nor had the writ of restitution dispossessed Agno until after all the foundation he claims for the patent had been laid. After he was dispossessed nothing was done except the bare issuance of the patent.

Estoppels *in pais* are of an equitable character, and dependent upon the facts and surroundings of the particular case. When a judgment is so connected with the parties and the subject-matter as that for the purpose of preserving a right it ought in equity to prevail, it becomes in fact and effect an estoppel *in pais*. Because it is a judgment which may not be pleaded as a bar, it does not lose its efficacy as any other fact or act on account of its bearing in the case as an estoppel, and the true situation and relation to the controversy may be

shown to ascertain its effect and to give to it its proper bearing. It may be good for one purpose and not for another. The relations of the parties to it, the reliance placed upon it by them, may make it good when otherwise its effect might be avoided. A party may acknowledge that it is valid under such circumstances as will not permit him to gainsay it. So it may have such a bearing from its particular relations to the controversy that in good conscience it ought not to be ignored. And such was the relation of this judgment to these parties. The defendants' rights had been established; they had been decreed the owners of the property. Agno knew this. He had in reality become a party to the suit, and to rob the defendants of their property and to set at naught this judgment awarding them the possession, he, in company with his confederates, entered into the conspiracy disclosed in the answer. In good conscience he ought to be estopped by the judgment.

The judgment having established the right and title of appellants at the date of its rendition, the question is not whether the alleged fraud of Agno operated to defeat his title, but should not operate to prevent a forfeiture of appellants' title? It may be that the rule laid down by the court in reference to the doctrine of estoppel would be good when a prior equitable and legal right is made to yield to a subsequently asserted one, but we deny its applicability to a case where the alleged fraud is sought to be made available to create a forfeiture of a prior equity and prior right. In the one case the question presented is whether the fraud shall operate favorably to the acquisition of a right by defeating the title of the party defrauded, in which case we hold that the rule laid down by the court is greatly relaxed. In the other case it is applicable where a valid subsisting right not founded in fraud is lost by reason of a fraudulent act of the owner. A bare suggestion of the situation of the parties with respect to the property in controversy shows the utter inapplicability of the rule invoked. In the one case the party is allowed to acquire a right by the very acts that are alleged as constituting the estoppel, and in the other the party has the right, and the estoppel is invoked to prevent its forfeiture. The real question is, did Agno acquire any rights against appellants by the perpetration of the alleged fraud? If he has acquired

any legal advantage by reason of it, is it not subservient to the equitable rights of the defrauded party? If A, the owner of land, conveys it to B, but the deed is not recorded, and C procures another deed with notice of B's rights, will it make any difference what C's object was? He is estopped because *per se* the act would be a fraud to allow it to stand.

2. Besides all this Agno and his privies are estopped even by the rule laid down by the court. He made false representations in material matters to the appellants. He made them with full knowledge of the facts, and the parties to whom they were made were ignorant of the truth of the matter. The representations were made by Agno with the intention that they should be acted upon by appellants, and they were acted upon by them. Because of such representations, false field notes, surveys and record, they failed to file their adverse claim, and the representations were made willfully and fraudulently to cause such failure in pursuance of a conspiracy to defraud appellants of their property. For the same purpose Agno entered upon the property, tore down the notices and declared to appellants that he had done wrong to interfere with their property and that he should make no further claim thereto, and this in pursuance of the same conspiracy to defraud appellants, and they, acting upon these representations and acts of Agno, failed to file their adverse claim and went forward and performed a large amount of work on the property. All this appears in the answer, and its allegations contain all the elements of an estoppel *in pais*.

3. The notice of the Nellie Grant location, the survey plats and record in the surveyor-general's office, as the answer alleges, were purposely so drawn, made and entered, that they failed to show that this location came in conflict with the Cannon and Cannon Extension locations. They represented a falsehood for the purposes of fraud. They were made to harmonize with the acts and representations of Agno when he tore down the notices and declared that he should make no further claim to the property, and for the same purpose of deceiving and defrauding the appellants. But if the notice, survey plat and record had been honest and proper, showing a conflict between the two locations, the appellants, under the circumstances, would have been relieved from filing an adverse

claim. They were the owners of the entire equitable interest in the property, but their rights, by reason of the fraudulent acts of the respondents, had been suspended. The statute does not provide for an adverse claim upon equitable grounds, but limits it exclusively to such actions as will determine the right of possession. The right of possession may be suspended or it may not set in until some equitable right is adjudicated, but there is no provision under the Mineral Land Act for the trial of equitable titles of this character, and consequently there is no bar to such actions when, according to the rules of equity, they should be entertained. A party may be finally entitled to the possession, when at the time he is required to interpose his adverse claim he would not be entitled to such possession, which is the only question that can be tried under the act. Then, is the equitable right lost by failure to file an adverse claim, when the trial to result from such claim can in no manner affect the equitable right? By the appeal and suspension of the writ of restitution the right of the appellants to possession was suspended. The right was not restored until after the writ became operative, and the answer clearly shows that no new title or right of respondents set in since that time. Both his entry and application for a patent under the charge in the answer were during its suspension, and while a motion for a new trial was pending. There might be some plausibility that such a new right had been acquired as would have required appellants to interpose an adverse claim under the notice, if the notice had been given after and the judgment and right of possession under it were capable of being enforced. When a party is not entitled to the right of possession, he can not maintain an action when the issue involves solely the right of possession. The necessity of interposing an adverse claim is determined by the right the party may at the time have to the possession. When a recovery upon his right of possession could not be had, he is not required to interpose an adverse claim. Such claim presupposes the right of possession and lays the foundation for the trial of such right. Nor would a judgment so suspended show right of possession. The party finally to be adjudged entitled to possession and restored thereto could not assert and maintain his right, while the operation of the judgment and writ of res-

titution were suspended. During such suspension the respondents who were in possession were entitled to the possession at the very time it is claimed the appellants should have interposed and brought an action that they could not maintain.

Nor was an adverse claim necessary. Merely changing the name of the property under the circumstances disclosed, without surrendering possession thus held under the Star of the West location, gave no new right, and left the status of the parties as if the application for the patent had been made under the Star of the West location, while the appellants' right to the possession under the judgment had been suspended.

But if it had been necessary for the appellants to have filed an adverse claim in order to protect their title, they were excused from so doing for the reason that they were not properly notified of the Agno application for a patent. The pretended notice was not sufficient to require them to take any action in the premises. The averment of the answer in substance is that the plaintiffs, conspiring to defraud the defendants, and to cause them to forfeit their title by failing to file an adverse claim, made the official survey, field notes and official plats of the Nellie Grant location on file and among the records of the surveyor-general's office, to show that such location did not conflict with the Cannon and Cannon Extension locations, or what is equivalent thereto, to fail to show that it did so conflict. With this record, survey and plats admitted to have been so made and drawn for the purposes of fraud, the plaintiffs, to further mislead and deceive the defendants, informed them the Nellie Grant location did not conflict with or embrace any part of the Cannon or Cannon Extension locations, and that they should make no further claim to the defendants' property. The false record, survey and plats they had made, and their false representations, were in perfect harmony, and both were in pursuance of a matured conspiracy to fraudulently obtain title to the defendants' property. The defendants had the right to look to the records of the surveyor-general's office, to ascertain if their property had been relocated, or in any manner infringed upon by the plaintiffs or others. The notice posted on the claim necessarily partook of the fraudulent character of the field notes, plat and survey, and was, in truth, no notice at all, and was not intended to be.

It did not call upon the defendants to protect their rights, for it did not show that they were imperiled and did not afford any basis for an adverse claim. This notice was intended by the law to give information instead of concealing it. Acting as a Statute of Limitation, and intending to cut off the right to claim the property after the expiration of a limited period, it ought clearly to designate what property is claimed, and if it fraudulently conceals the property in order to prevent inquiry and claim, it is no notice.

4. Much is said in the opinion of the court to show that the answer does not contain allegations sufficient to entitle the appellants to a patent, and therefore that the respondents can not be compelled to convey to them. In other words, that there is not sufficient alleged to entitle appellants to the affirmative relief demanded. It must, however, be remembered that the respondents are seeking to recover by virtue of their own title, and demanding that appellants be perpetually enjoined. They must recover upon the strength of their own title, and not upon the weakness of that of their adversary. If the answer contains a defense it is not subject to demurrer, because it does not state facts sufficient to entitle the defendants to the relief demanded. If it contain sufficient to defeat the plaintiffs' action it is a good answer. It is sufficient to defeat the plaintiffs' action if the answer shows that the defendants are the owners of the equitable title to the property while the plaintiffs hold the naked legal title, or that the plaintiffs are estopped from claiming title by reason of the judgment or *in pais*, even though there had been no demand for affirmative relief. If the patent to Agno prevented appellants from applying for a patent, as it did, and also from taking any steps in that direction, then they were excused from so doing. The law does not require them to do a vain thing; and though they were entitled to a patent they could not procure one while that to Agno was outstanding, or while the property was in his possession, and held thereby a suspension of the writ of restitution, and so they were excused from making the effort. All they could do is what they have done at the first opportunity, to show that they were the owners of the equitable interest in the property, and that Agno was trustee for them, holding the legal title for their benefit. Showing this

they defeat the plaintiffs' action. By the Cannon and Cannon Extension locations, the property was granted by the government to the appellants, which grant was kept alive and in full force by possession and work upon the claims, and thereby they became entitled to the exclusive right to take the necessary steps to apply for a patent, and the government having parted with this beneficial interest in the property and the grant to the appellants never having been divested, there was no room for a second grant to any other person, for as to this property, it had nothing to convey but the naked, legal title which it or its grantee held or holds as trustee for the real owner.

A patent is not conclusive evidence of title in a court of equity. The adjudication of the land office is not in all cases final. That tribunal determines and the patent appropriates the legal title, and where the question depends upon that title alone such appropriation is conclusive. But this leaves untouched the equity jurisdiction of the courts to go behind the patent, and if the facts warrant, to make the owner of the legal title but a trustee for the equitable owner, or otherwise to modify or adjust the rights of the parties and decree accordingly. Where the government has parted with its title, and the question becomes one of private right, courts of equity, for the purpose of relieving against fraud, accident or mistake, may look behind a patent and decree in favor of the real owner, though the legal title may be held by another. Where the officers of the land office decide controverted questions of fact in the absence of fraud, imposition or mistake, their decision on the question is final, except it be reversed on appeal in the land department. Fraud, imposition or mistake may be presumed to exist so as to give a court of equity jurisdiction, when the land office issues different patents to different persons for the same property; or when it issues a certificate for a patent which is evidence of a governmental grant, to one person and the patent itself to another for the same property; or when the government, having, by its valid grant (as in this case by virtue of the Cannon and Cannon Extension locations), conveyed the property to one person, by a title equivalent to a patent, and should thereafter, while such grant remained vested and in full force, convey the same property

by patent to another. In all such cases the patent is not conclusive, and courts of equity have jurisdiction to go behind the patent and ascertain who is the real owner, and decree accordingly: *Johnson* v. *Towsley*, 13 Wall. 81. And so, if the answer did not contain averments which entitled the appellants to the affirmative relief demanded, the court had jurisdiction to try and determine the defense that was sufficiently alleged, and the demurrer to the answer should have been overruled.

Affirmed.

1. Estoppel by non-claim, and attestation of deed: *Fabian* v. *Collins*, 5 M. R. 520.

2. Purchaser of right to use coal screener, taking the same subject in terms to defects, if any, in the patent, is estopped to set up any such defects against the purchase money: *Heilner* v. *Battin*, 27 Pa. St. 517.

3. Same rules of estoppel *in pais* apply to mining claims as to other realty under like title: *Kelly* v. *Taylor*, 5 M. R. 598.

4. Estoppel by standing by and allowing expenditures: *Parke* v. *Kilham*, 4 M. R. 522; *Ernest* v. *Vivian*, 33 L. J. Ch. 513; *Post* LACHES; *McGarrity* v. *Byington*, 2 M. R. 311.

5. Estoppel of trustees to deny incorporation: *Parrott* v. *Byers*, 40 Cal. 614; *Post* STOCK.

6. Purchase of a title to "buy his peace" does not estop vendee to deny its validity: *Kahn* v. *Old T. Co.*, 2 Utah, 174; *Post* PATENT.

7. Lessee estopped by facts *in pais* against denying forfeiture: *Wilmington Co.* v. *Allen*, 95 Ill. 288; *Post* LEASE.

8. A judgment conclusive against both parties is an estoppel: *420 Co.* v. *Bullion Co.*, 3 Saw. 634; *Post* PATENT.

9. A statement or report not acted upon does not create an estoppel: *Collins* v. *Case*, 1 M. R. 91.

10. Receipt of royalty estops denial of the lease: *Trout* v. *McDonald*, 83 Pa. St. 144; *Post* LEASE.

SHAY ET AL. v. THE TUOLUMNE COUNTY WATER CO.

(6 California, 73. Supreme Court, 1856.)

[1] **Admissions of stockholders.** In an action against a corporation for trespass it is error to admit testimony as to the acts or admissions of individual members of the corporation unless they acted under its express authority.

Appeal from the District Court of the Fifth Judicial District, County of Tuolumne.

The plaintiffs brought their action for damages for trespass on a mining claim. The jury found a verdict for plaintiffs for $500. The defendants moved for a new trial on the ground, among others, of error in law occurring at the trial and excepted to by defendants, which appears in the opinion of the court. The motion was granted, and the plaintiffs appealed.

ROBINSON, BEATTY & SACKETT, for appellants.

H. P. BARBER, for respondents.

Mr. Chief Justice MURRAY delivered the opinion of the court. Mr. Justice HEYDENFELDT and Mr. Justice TERRY concurred.

This is an appeal from an order of the court below granting a new trial.

The suit was brought to recover damages of the company for flooding the plaintiffs' claim with water. On the trial of the cause, the court permitted the plaintiffs to ask one of their witnesses whether individual members of the company had employed him to drive them out of their claims.

This was error; the company was an incorporation and was not bound by the acts or admissions of its members, unless they were acting by its express authority. It is said that this interrogatory was answered in the negative, so that no harm could possibly arise to the defendants from the question. The record does not contain the answer, and it is but justice

[1] Admissions of officers, when evidence: *Green* v. *Ophir Co.*, 45 Cal. 522. *Post* PLEADING; *Cons. Co.* v. *Raber*, 1 M. R. 405; *Webb* v. *Smith*, 6 Colo. 365.

to presume that the court below, in view of the whole case, has properly exercised its discretion.

Judgment affirmed, with costs.

LOMBARDO v. FERGUSON ET AL.

(15 California, 372. Supreme Court, 1860.)

[1] **Copy of notice of location as evidence.** A copy of a notice posted on a claim to show its extent is not admissible in evidence if the notice itself be obtainable. Such evidence is secondary, and is admissible only upon the terms which control its admission in other cases.

Appeal from the Fifth District.

Action to recover nine hundred feet of a quartz claim. Plaintiff proved that the lead was discovered by one Villas, and located by him and four others, plaintiff being one. It was also shown that the discoverer, under the mining customs, was entitled to three hundred feet, and each locator to one hundred and fifty feet. Plaintiff introduced bills of sale from the locators of this claim to himself, and proved that subsequently to such location, defendants entered upon one hundred and fifty feet of the nine hundred claimed by plaintiff.

Defendants introduced one Parks as a witness, who testified that he made a copy of a notice he saw posted on plaintiff's claim. Defendants then offered this copy in evidence, to the introduction of which plaintiff objected, on the grounds, among others, that the original should be produced, its loss accounted for, or notice to plaintiff to produce it be shown. The court overruled the objection, and admitted the copy, plaintiff excepting.

Defendants also showed that it was customary to put up notices in the center or at the end of such claims, indicating the extent thereof.

Defendants had judgment. Plaintiff appeals.

[1] But see *Dunning* v. *Rankin*, 19 Cal. 641; *Post* LOCATION. The notice is often penciled upon a blazed tree; but even where placed on a detachable piece of paper, I have never known the court to require the production of the original.—R. S. M.

L. QUINT, for appellant.

1. The existence of an original notice having been shown, a copy was not admissible, until the loss or destruction of the original was proven: *Macy* v. *Goodwin*, 6 Cal. 579; 2 Id. 25; 6 Id. 460; 1 Greenl. Ev., Sec. 82.

2. If the original was in plaintiff's custody, notice to produce it was essential before the copy was evidence.

COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

This is an action to recover possession of a mining claim. On the trial of the case, the defendant read in evidence a copy of a notice shown to have been posted on the claim in question, and purporting to be a notice signed by the plaintiff, and those from whom he purchased. No foundation was laid for the introduction of this evidence, and its admission was, therefore, erroneous. The absence of the notice was not accounted for, nor was it shown that the plaintiff had been notified to produce it. The evidence was secondary in its character and was admissible upon the same terms which control the introduction of such evidence in other cases. It could only be resorted to if the higher evidence of the notice itself was not attainable, and to render its introduction proper, that fact should have been shown.

Judgment reversed and cause remanded for a new trial.

JENNY LIND CO. v. BOWER & CO.

(11 California, 194. Supreme Court, 1858.)

Parol testimony to explain the word "north"—Magnetic variation. In an action of trespass it appeared that the parties had entered into a written agreement as to the boundary line between their claims, and the question was whether parol evidence was admissible to show that the word *north* in the agreement referred to the magnetic and not the true meridian: *Held*, that such evidence was admissible to explain, not to contradict, the written language. That the ambiguity in the word north consists in the fact that it will admit of two interpretations, and not from any patent ambiguity.

Affidavit of new witness in support of new trial. A motion for new trial on the ground of newly discovered evidence should be accompanied with the affidavit of the witness as to what he will testify; the affidavit of the moving party is not sufficient, and lack of time for obtaining the necessary affidavit will not excuse the party; he should apply to the court for more time.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

This was an action to recover damages for an alleged trespass upon the mining grounds of the plaintiffs. The claims of the parties adjoin each other; and in June, 1857, they entered into a written agreement as to the dividing line between the claims, describing the same as commencing at a designated point, and "*running thence north twenty-three degrees and fifteen minutes west, six hundred and forty-three feet to a pine stake*," and "*thence north forty-five degrees west* to Devil's Cañon"; and the principal question presented by the record relates to the admissibility of parol evidence to show that the last course of the dividing line thus agreed upon was run according to the magnetic, and not the true meridian. It appeared from evidence allowed on the trial, that it was the general custom at Forest Hill, where the ground in controversy is situated, to run boundary lines by the magnetic meridian; and from the testimony of a witness present at the execution of the agreement, that it was understood the line was to run "the way the needle points." The cause was tried by a jury, who returned a verdict as follows, to wit: "We, the jury, find for the plaintiffs, and assess their damages at $3,100. We further find, that the lines mentioned in the agreement introduced in the evidence in this case were to run by the magnetic meridian." Judgment was entered upon this verdict for the plaintiffs. Defendants moved the court for a new trial on several grounds, and amongst others, on the ground of "newly-discovered evidence, material to the defendants, which they could not with reasonable diligence have discovered and produced at the trial." The motion was supported by the affidavit of Marshall, one of the defendants, setting forth that since the trial of the cause, one Hoffman had informed him that he would testify to certain facts, which facts are set out in the affidavit; but affiant being igno-

rant of the law, did not know that Hoffman's affidavit as to what he would testify to was necessary, until it was too late to procure the same in time for the hearing of the motion. The affidavit sets out the residence of Hoffman, and alleges that if a new trial is granted, defendants will be able to produce his testimony at the trial.

The court below overruled the motion, and the defendants appealed to this court.

THOS. H. WILLIAMS, for appellants.

HILLYER, for respondents.

FIELD, J., delivered the opinion of the court, BALDWIN, J., concurring.

This is an action to recover damages for an alleged trespass upon the mining ground of the plaintiffs. The claims of the parties adjoin each other, and in June, 1857, the parties entered into a written agreement as to the dividing line between their claims, describing the same as commencing at a designated point, and "*running thence north, twenty-three degrees and fifteen minutes west, six hundred and forty-three feet to a pine stake*," and "*thence north, forty-five degrees west*, to Devil's Cañon;" and the principal question presented by the record relates to the admissibility of parol evidence to show that the last course of the dividing line thus agreed upon was run according to the magnetic, and not the true meridian. It appeared from evidence allowed on the trial, that it was the general custom at Forest Hill, where the ground in controversy is situated, to run boundary lines by the magnetic meridian; and from the testimony of a witness present at the execution of the agreement, that it was understood the line was to run "the way the needle points." It is true, parol evidence is inadmissible to contradict or vary the terms of a written agreement; but we do not perceive that the rule was violated in the present case. It was not to contradict or vary the meaning of the term *north* that the evidence was admitted, but to ascertain the sense in which it was used by the parties. The term has two meanings, one common and the other technical. Unprofessional men generally mean, in stat-

ing courses, the lines indicated by the compass, without making any allowance for variation in the needle; and even professional surveyors, as appears from the evidence in the case, would not consider the true meridian as intended, unless specially so informed.

The language of every instrument should be so construed, if possible, as to effectuate the intentions of the parties; and to ascertain the meaning attached to particular words when such words are used in various senses, parol evidence is perfectly legitimate. And this evidence is received to explain, and not to contradict or vary the written language. The patent ambiguity, which according to the rules of Lord Bacon can not be aided by averment, arises from uncertainty upon the face of the instrument in the application of the terms used, and not from uncertainty in the meaning of the terms themselves, when those terms are susceptible of two meanings. (See 2 Parsons, 69, and note.) In the present case the ambiguity lies in the word "north"; and yet it is not within the rule laid down by Bacon. It belongs to that "intermediate class of cases," of which Mr. Justice Story speaks in *Peisch* v. *Dickson*, 1 Mason, 11, "which partake of the nature both of patent and latent ambiguities; and that is," where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. "In such a case, I should think," says the justice, "that parol evidence might be admitted, to show the circumstances under which the contract was made and the subject-matter to which the parties referred. For instance, the word 'freight' has several meanings, in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board of the ship or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term": *Goddard* v. *Bulow*, 1 Nott & McC.; *Smith* v. *Wilson*, 3 Barn. & Ad. 728; *Heald* v. *Cooper*, 8 Greenl. 32; *Clayton* v. *Gregson*, 4 N. & Man. 602.

And Cowen and Hill, after referring to the illustration

given by Mr. Story, observe that this and other instances of a kindred character "fall exactly within the general definition of a patent ambiguity. The terms used have in themselves a doubtful meaning, and consistently admit of more than one interpretation, according to the subject-matter in contemplation of the parties. The ambiguity is not *latent* in any proper sense; it arises from the known infirmity of language; it is inherent in the instrument, appearing on its face, and evincing a difficulty at the very moment of perusal. And yet it admits of explanation.

"It will not do to say, therefore, that a patent ambiguity (meaning thereby merely an ambiguity patent or appearing on the face of the instrument) can not be explained by evidence *aliunde*, though such remarks are frequently found in the books." Notes to Phillips, part ii, note 269.

The motion for a new trial was properly overruled. The position of the boundary line was the principal question in the case, and upon this point several surveyors were examined, and upon their conflicting testimony the jury passed. The subsequent survey of one of the surveyors would only have corroborated the testimony of the defendants' witnesses, and correspondingly weakened the testimony adduced by the plaintiffs. We do not perceive that it would, taken in connection with the different starting point from the first survey, have materially changed the result.

Each of the surveyors testified to using the utmost care, and each was of opinion that his survey was correct. The court below was in a better position to judge of the effect of Brewster's testimony in the case, and the probable result of his evidence after the second survey, than this court, and we do not feel warranted in disturbing its action in the premises.

The affidavit of Marshall, as to the testimony which Hoffman would give, should have been accompanied by Hoffman's affidavit. Hoffman's absence at his residence at Forest Hill, and the consequent inability of Marshall to obtain the affidavit in time, was not a sufficient excuse for its non-production. If necessary, application should have been made to the court for additional time to obtain and file it.

Judgment affirmed.

JACKSON ET AL. v. THE FEATHER RIVER AND GIBSONVILLE WATER CO.

(14 California 18. Supreme Court, 1859.)

Practice on appeal as to counter-exception. It is the practice of the Supreme Court of California to look only to the errors assigned by appellant and not to consider exceptions taken by respondent.

Execution of bill of sale, how proved—Handwriting of subscribing witness. Proof of the execution of a bill of sale of a mining claim by the vendor, and of the handwriting of the subscribing witness, who is absent from the State, is sufficient proof of the paper, even though the testimony of such subscribing witness might by due diligence have been obtained before his departure from the State.

Bill of sale not under seal. It is no objection to the admissibility of a bill of sale of a mining claim that it is not under seal, whatever may be the effect of it, as evidence.

[1] **Title transferred by delivering possession.** Upon questions as to the occupancy of public mineral land, a transfer of the right of the occupant to the possession may as well be evidenced by agreement as by deed, *when followed by possession.*

[2] **Identifying property described in deed—Order of proof.** Where documentary evidence in the shape of conveyance of mining claims is admitted, further proof may be given, if requisite, to show the identity of the claims with those mentioned in the complaint, and the court will not control the order of proof.

Cross-examination for purposes of denial. In an action to recover damages for injury to plaintiffs' mining claims occasioned by the overflow of defendants' ditch, the plaintiffs' counsel had asked witness "Did you see water splashing over the flume"? He answered in the affirmative, and on cross-examination was asked, "Whose water was that you saw splashing over the flume?" *Held*, that the question was proper cross-examination to show that the overflow was not occasioned by the acts or negligence of the defendant, but by acts of others; and that it was matter of mere denial, and not of such defense as is restricted to the opening of defendants' case.

Error is prima facie injury. Every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party to show clearly that no hurt was done by the error.

Appeal from the Fourteenth District.

The opinion of the court shows the points of appeal. The pleadings were verified. The jury found damages for plaint-

[1] *Copper Hill Co.* v. *Spencer*, 3 M. R. 267.
[2] *Reamer* v. *Nesmith*, 5 M. R. 609.

iffs, one thousand two hundred and ninety dollars. Judgment accordingly, and defendants appeal.

McCONNELL & NILES, for appellants.

VANCLIEF & STEWART, for respondents.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

1. We do not see in the respondent's brief any notice of the point argued by the appellant that this court should look into, and determine this case in reference to the exceptions taken by respondent. It is not necessary for us to consider that point. Our practice, however, has been to look only to the errors assigned by the appellant.

2. On the trial of this case, which was for injury sustained by the owners of mining claims by the defendants' ditch, several technical questions arose.

The plaintiffs offered to introduce two bills of sale to the premises injured—one made by Huntoon & Co. to John Cornack, for one fifth of five mining claims in Gibsonville, known as Read, Thompson & Rockwell's claims—which paper is called Exhibit No. 1, and is attested by one Wentworth. The objections were: 1. Its execution was not properly proved. 2. That it was not under seal.

It seems that the subscribing witness was shown to be out of the State, and his handwriting was proved. The execution by Huntoon & Co. was also proven. This was enough. There is nothing in the objection of a want of a seal, which goes to the admissibility of the paper, whatever might be the effect of it. The plaintiffs claimed to be in possession. It could not be improper, and might have been important, to show that they were in possession *bona fide* under a claim of right, and with title to occupy and enjoy the property. Indeed, we are unable to see why, upon questions as to the occupancy of public mineral land, a transfer of the right of the occupant to the possession—which is about all his claim to it—is not as good for all purposes, to the vendee taking possession, when evidenced by an agreement, as by a deed.

3. The plaintiffs offered Exhibit No. 2, being a like bill of sale

from Kimball, Perry & Co. to the Simpson Mining Co., dated in 1856. One Tabor was a subscribing witness. The plaintiffs proved the signature of Tabor, and the execution of the paper by the firm of Kimball, Perry & Co. The defendants showed that, after the institution of the suit and near the time of the trial, Tabor was in the State, and no efforts seem to have been made to get his testimony. On this ground, the appellant insists the bill of sale was not properly proved. We think the objection not good. We have been referred to no authority which holds to an exclusion of this secondary evidence, on the ground of a want of diligence in getting the proof of the absent subscribing witness before he departed the State; and the adoption of such a practice would not only make the rule uncertain, but lead to a great deal of unnecessary trouble. The proofs of the execution of papers are usually formal matters, and it would be much better, probably, as a general rule, to simplify and facilitate the mode of proof than to restrict it.

4. The next objection is, that the claims in this bill should have been first identified. The bill itself refers to them sufficiently to show their general description, and if it required further proof to locate or define them, such proof is admissible for that purpose. We would not reverse because the court refused to interfere with the plaintiffs' order of proof, no injury appearing to be done by such refusal—as, indeed, could scarcely be.

5. We have had more difficulty as to the fourth assignment of errors. This consists of the refusal of the court to permit the defendant, on the cross-examination of the witness, Gerslin, to put the question, "Whose water was that you saw splashing over the flume?" The plaintiff had, in the examination in chief, asked the question, "Did you see water splashing over the flume?" And to this inquiry, an affirmative answer was given. The pertinency of the evidence is seen in the fact that the action is brought to recover damages for the overflow or leakage of the water from the ditch, it falling upon and injuring the claims of the plaintiff, the gravamen of whose right to recover was the injury resulting from this cause, which he alleged was a negligent use of defendants' ditch. This negligence and damage were denied and were put in is-

sue by the pleadings; and the defendants, it seems, wished to show that this injury arose from the acts of others, for which they were not responsible. Whether the question propounded tended to that result with much directness or significance or not, it bore to some extent upon the inquiry. But apart from this, it is contended that the question was within the legitimate bounds of a cross-examination. The plaintiff contends now, not that the question was not relevant, or the answer important, but that it was asked inopportunely. He argues that this was matter of defense, and that the defendant had not opened his case at the time the question was asked, and he quotes Greenleaf, Sec. 447, to this effect: "A party who has not opened his own case, will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though after opening it he may cross-examine them for that purpose."

We do not think the respondent can maintain his position. In the first place, the right of cross-examination is one of the most important privileges pertaining to a trial of an issue of fact. It exists, and ought to exist, in great latitude, for it is the only effectual shield against perjury, and the only sure means of eliciting the whole truth. We are inclined to agree with the counsel for the appellants, that courts are apt to take too narrow a view of the rights of the examiner in such cases, and to give too extended a scope to the rule that a cross-examination is to be confined to the subject-matter of the evidence in chief. Undoubtedly, the cross-examination can not go beyond that matter; but it ought to be allowed a very free range within it. In order to this, the witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and the cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully tested. Much must be left to the discretion of the counsel upon this subject. When the witness testified to the breaking of the water over the flume, on cross-examination everything was proper and germane in regard to the water, the quantity, the force, the quality, the times and even the ownership, where the water came from, how it was conducted or let off, and who turned it in.

But the question was proper in another respect. The defendant would seem to be charged by this overflow; it was a mere denial, not new matter of defense, to show that this overflow was not occasioned by his acts or his negligence, but by the acts or negligence of another; for the defendants are only held by their own acts of negligence or commission. So that this matter was, at least, as much in rebuttal of plaintiff's case as setting up his own.

We do not understand the doctrine of Greenleaf to go further than this: that if a defendant sets up a defense not necessarily involved in the denial of the plaintiff's case, but consisting of new matter, that then the defendant must wait until after his opening before he offers proof of this new matter. But the rule is wholly different when all the defendant, on cross-examination, wishes to disprove by the plaintiff's witness, is the very case that witness has made.

We can not see clearly that the defendants were not injured by this error. They might not have been, but the rule is, that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none *could have been*, or was, done by the error.

We regret to be obliged to send this case back on so small a point, but so the law, as we read it, ordains.

Judgment reversed and cause remanded.

KELLY ET AL. V. TAYLOR ET AL.

(23 California, 11. Supreme Court, 1863.)

Extent of location, how proven—Explanation of notices. In an action to recover possession of mining ground arising from dispute as to boundaries, a witness who testifies that plaintiffs' location was made both by posting notices and marking boundaries, may testify whether the disputed premises are included within such boundaries; and an objection that the notices are the best evidence of the extent of the location is not well taken.

[1] **Rules of estoppel in mining cases.** The rules of law relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under a similar kind of title.

[1] *Patterson* v. *Hitchcock*, 5 M. R. —.

Resultant injury, essential to perfect estoppel in pais. Parties who allow a stranger to enter upon their mining claim without notifying him of the extent and nature of their claim will not be estopped from afterward setting up their title unless the stranger was injured by the silence of the owners.

Erroneous instructions as ground for reversal. If a case is submitted to a jury upon instructions, some of which are erroneous, it is sufficient ground for reversal that the jury might have been influenced by such erroneous instructions, though the evidence may have been sufficient to sustain the verdict independent of the instructions.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

Plaintiffs and defendants owned mining claims adjoining each other, upon which they had been at work for several years. A dispute arose as to the precise location of the boundary line between them.

On the trial, it appeared from the evidence that plaintiffs had at various times performed labor on the disputed ground by running drifts into it and performing other work upon it, and that the fact that plaintiffs were performing such labor was probably known to defendants, and that defendants had not notified plaintiffs to cease such work.

Plaintiffs had judgment in the court below, and defendants appealed.

SEARLS & NILES, for appellants.

HENRY K. MITCHELL, for respondents.

CROCKER, J., delivered the opinion of the court, COPE, C. J., concurring.

This is an action to recover possession of certain mining ground, and damages for injuries thereto. The plaintiffs and defendants were each the owners of adjoining claims, and there was a dispute between them respecting the location of the division line, by which a portion of the mining ground was claimed by both parties. The plaintiffs had previously run their tunnel into and mined out a portion of the disputed ground, which was known to the defendants.

On the trial one Clark testified, as a witness for the plaintiffs, as to the acts of those who originally located the ground claimed by the plaintiffs, showing the posting of notices and

the location of certain trees which marked the boundary lines, and of certain ditches and a shaft, and the location of the lines in relation thereto. He was then asked: "Did the location you made include the ground in dispute?" To which the defendants objected on the ground that the testimony showed that the location had been made by notices, and that they were the best evidence of the extent of the location. The objection was overruled, and the defendants excepted. The question was a proper one. The location does not seem to have been made by notices alone, and it was clearly proper for the witness, after stating the location of the lines of the claim, to state whether those lines included the ground in controversy.

After the evidence was closed the court instructed the jury as follows: "That in the matter of estoppel a different rule applies to mining claims from that applicable to other species of real estate; that an owner of a mining claim, the boundaries of which are not visibly marked, should notify strangers entering upon it of the nature and extent of his claim, and if he knowingly permits persons to enter upon his claim and expend money in working and improving it, without notifying such persons of his title, he is thereby estopped from setting up such title as against them."

The first branch of this instruction is erroneous. The rules of law relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under a similar kind of title. The rest of the instruction is also erroneous, as it omits entirely several important and essential qualifications of the rule upon this subject. Thus it should state that the party entering did so under a claim of right or title, and that the true owner remained silent under such circumstances; that his silence operated as a fraud upon the other party, and that the latter was induced thereby to make valuable and permanent improvements, and would therefore be injured by allowing the true title to be set up against him. As was stated by this court in the case of *Boggs* v. *The Merced Mining Company*, 14 Cal. 368, "There must be some degree of turpitude in the conduct of a party, before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

The respondents insist there was sufficient evidence to sustain the plaintiff's case, independent of these instructions, and that he did not rely upon the doctrine of estoppel in the court below. The case was tried by a jury, and it is impossible for us to tell upon what particular portion of the evidence they founded their verdict, or what instructions controlled them. They may have found for the plaintiff entirely upon these erroneous instructions, or they may have disregarded them entirely. It is sufficient, however, if it appeasr that they might have been influenced thereby, to make it our duty to send the case back for a new trial, that the error may be corrected.

The judgment is reversed and the cause remanded for further proceedings.

DRAPER v. DOUGLASS ET AL.

(23 California, 347. Supreme Court, 1863.)

Conveyance not under seal. Instruments conveying mining claims need not be under seal.

[1] **Res gestæ—Declarations of miner.** In an action to recover a quartz lode, the statement of the plaintiff, while working at a distance from the lode, that his object was to drain a ravine so as to ru a tunnel in'o the lode, is admissible as part of the *res gestæ*, and for the purpose of showing that the work was designed to be applied upon the claim.

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

Plaintiff recovered judgment in the court below, and defendants appealed.

H. H. HARTLEY, for appellants.

P. L. EDWARDS, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover the possession of a certain quartz

[1] *Richards* v. *Schlegelmich*, 3 M. R. 78.

lode in the county of El Dorado. It seems that the lode was located by one Kisardo and three others, in October, 1861, and afterward Kisardo bought out the others and took bills of sale from them, and the plaintiff claimed title under a conveyance from Kisardo. On the trial, the latter was examined as a witness, and testified that these bills of sale to him had been lost, and explained when and where. The defendants objected that these bills of sale were not under seal and to proof of their contents, on the ground that the originals were not duly accounted for; and it is insisted that the court erred in overruling the objection. This court has repeatedly decided that instruments conveying mining claims need not be under seal,[1] and the evidence fully establishes the loss of the originals. There was, therefore, no error in this action of the court.

One of the witnesses testified that he saw the plaintiff at a certain time at work some fifty or a hundred feet below the tunnel which had been commenced by the original locators, digging up the rock toward the tunnel; and the plaintiff told him at the time that the object of the work was to drain the ravine to run a tunnel into the quartz lode. The statement of the plaintiff was objected to, and the action of the court in admitting it is assigned as error. It was clearly admissible as part of the *res gestæ*. The plaintiff was engaged in work at a distance from the lode, and he explained the object of the work; that it was to enable him to mine the lode, thus showing the connection between the work and the mine.

It is often the case, that miners commence their operations in sinking shafts and running tunnels at a distance from the lode sought to be worked, and their statements while thus engaged in the work, as to the object they are seeking to accomplish by it, are properly admissible as part of the *res gestæ;* otherwise it might be claimed that they were doing no work on the mine, because of the distance from the lode. Verbal and written declarations are often said to be admissible, as constituting a part of the *res gestæ*. As such, they are most properly admissible when they accomplish some act—the nature, object, or motives of which are the subject of inquiry: 1 Phillips' Ev., C. H. & E.'s Notes, 185 and Note 80. This point is therefore not well taken.

[1] The act of 1860 (mentioned post 607) is wholly overlooked by the court.

The next objection is, that the judgment is contrary to the evidence. We are satisfied from an examination of the testimony that the evidence sustains the judgment.

The judgment is therefore affirmed.

HENRY v. EVERTS.

(29 California, 610. Supreme Court, 1866.)

Evidence of value from subsequent working. Where, in support of an allegation of fraud in the purchase of a mining claim, it became material to show that the purchaser knew that he was paying an inadequate price, it was *held*, that the amount of gold dust extracted from the mine subsequent to the sale was not admissible to prove knowledge by the purchaser of the real value of the mine.

Real and market value of mines. In ascertaining whether the price paid was inadequate, the inquiry must be restricted to the market value of the property at the time of sale. And this may be very different from its intrinsic value. This is peculiarly the case with a mine, the real value of which, at any given time, can only be ascertained when the mine has been exhausted.

[1] **Sale in fraud of creditors—Knowledge of purchaser.** When a debtor has sold a mining claim in fraud of his creditors, as alleged, the sale can not be set aside for inadequacy of price alone, if such inadequacy of price was not known to the purchaser, and he was otherwise a stranger to the vendor's fraudulent intentions.

Operation of evidence restricted. The operation of evidence is properly restricted to the purpose announced at the time it is offered and admitted.

Appeal from the District Court of Placer County, Fourteenth Judicial District.

On the 3d day of March, 1862, P. Everts sold to George L. Everts, the defendant, three tracts of mining claims, called the Last Chance claims, the Keystone claims, and the Bucannan claims. July 31, 1862, the plaintiff recovered a judgment against P. Everts in the district court, upon which he afterward issued an execution and sold the claims, and became the purchaser at the sheriff's sale, and no redemption being made, afterward obtained a sheriff's deed. He then brought the present action to recover possession of the claims,

[1] *Harris* v. *Tyson*, 24 Pa. St. 347; *Post* VENDOR AND PURCHASER.

and sought to prove on the trial that the sale from P. Everts to George L. Everts was fraudulent.

For the purpose of showing that the sale was fraudulent, plaintiff relied in part on the alleged inadequacy of the price paid.

Plaintiff recovered judgment in the court below, and defendant appealed.

The other facts are stated in the opinion of the court.

CHAS. A. TUTTLE, for appellant.

JO. HAMILTON, for respondent.

By the court, RHODES, J.:

It appears from the statement on motion for new trial, that the plaintiff, for the alleged purpose only of proving the value of the Last Chance claims, and the inadequacy of the price paid for those claims by the defendant at the sale by P. Everts, as evidenced by the deed of the 3d of March, 1862, proved by several witnesses that the defendant "after his said purchase, took out large sums of money in gold dust while mining said Last Chance claims, amounting to many thousand dollars over expenses."

In ascertaining whether the price paid for a parcel of property was adequate, the inquiry is what was the market value of the property at the time of sale. The market value may be, and often is, quite different from the real, the intrinsic, value. In many instances the property may possess a value, or be subject to a defect that neither the vendor nor purchaser can discover by the exercise of the greatest circumspection and diligence until after the property has for a long time been appropriated to the purposes for which it was purchased. This is peculiarly the case with a mine. Its real value at a given time is ascertainable only when the mine has been exhausted, and it is therefore impossible that the real value can aid in determining the market value.

The only service that evidence showing the inadequacy of the price paid for the claims by the defendant would perform, in an attack upon the sale by the plaintiff as a creditor of the defendant's vendor on the ground of fraud, would consist in its tendency to show the *scienter* of the defendant, at the time of his purchase; for if the price paid was far below the true

value, and that fact was unknown to the defendant, he is not chargeable on that ground with the consequences of the fraudulent acts of his vendor in making the sale in fraud of his creditors. It requires no argument to prove that evidence showing the amount of gold extracted from the mine subsequent to the sale does not tend to prove knowledge by the purchaser of the real value of the mine.

The error in admitting such testimony was not rendered immaterial or productive of no injury to the defendant, by the introduction in evidence of the judgment roll in the case of *Henry* v. *P. Everts and G. L. Everts*, in which the vendor's lien upon the undivided half of the Keystone claim was enforced, and the sale by P. Everts to G. L. Everts was held fraudulent and void as against the plaintiff; for the plaintiff offered it in evidence as appears from the statement "only as foundation for plaintiff's title papers introduced in evidence as hereinafter specified, to wit, execution of sheriff's (Gooding) and Bullock's deeds." The operation of the evidence was restricted to the purpose announced when the judgment roll was offered and admitted.

Judgment reversed, and the cause remanded for a new trial.

KING v. RANDLETT.

(33 California, 318. Supreme Court, 1867.)

Deed must be produced or accounted for. An interest in a mining claim being purchased by deed, the transfer can be shown only by production of the deed, or by proof of its loss and secondary evidence of its contents.

Proof of location and proof of purchase, distinguished. Where a company has taken up a claim by location, proof of a person being a member of the company would be competent, and his acting as such member would go to show his interest in the claim as a joint locator; but where a party claims by purchase he can only show title by the production of his deed, or proof of contents after loss and search.

Verbal conveyances no longer valid. Since the act of 1860, a deed or bill of sale accompanied by delivery of possession, is essential to pass the title of a mining claim. Prior to such act, a verbal sale accompanied by delivery of possession, was sufficient.

Misnomer of company defendant. Miners associated under a company name may be sued by that name under which they transact business; but judgment can not be entered against the "Independent Tunnel Company" upon a default against the "Independent Company."

Assigning the deed conveys not the claim. An assignment of a party's right, title and interest in and to a deed does not pass the title to the mining claim therein described. It should be conveyed by deed and not by an assignment of a deed.

Appeal from the District Court, Fourteenth Judicial District, Placer County.

This was an action to recover the possession of two and one half undivided sixteenth shares of the Independent Tunnel mining claims in Placer county. The plaintiff, in the complaint, alleged title in himself and an ouster by the defendant. The defendant, in answer, denied all the averments of the complaint, except the fact of his (defendant's) possession, alleged title in himself, and pleaded the Statute of Limitations. The cause was tried before the court with a jury. The plaintiff, in the statement of his cause at the commencement of the trial, stated his title to the demanded premises to be derived by purchase by deed or bill of sale. The plaintiff stated, as a witness in his own behalf, that the deed or bill of sale was lost, and, under the objection and exception of the defendant, gave testimony of its contents.

The testimony of the witness, Deiner, was offered to show title to the demanded property in the plaintiff; the defendant objected to its introduction on the grounds of incompetency and irrelevancy, and excepted to its admission.

The defendant deraigned title under a purchase of the demanded property by Garrison at a judicial sale, and duly excepted to the exclusion of the record of A. B. Scott, J. P., when offered to prove title in him to the demanded property; also to the judgment, the deed to Garrison and the assignment of the deed to the plaintiff, to show color of title in plaintiff in aid of his plea of the Statute of Limitations. The plaintiff had judgment, and the defendant appealed. The case came up on the judgment roll, containing bills of exceptions taken by the parties respectively.

The other facts are stated in the opinion of the court.

C. A. TUTTLE, for appellant, argued against the sufficiency of proof of the loss of plaintiff's deed to let in parol evidence of its contents, and for the admissibility of the judgment roll from the justice court of A. B. Scott, and the constable's deed,

with its assignment to plaintiff, for the purposes—first, of showing title in plaintiff; and, second, to show color of title in plaintiff; and on the last point, cited *Kimball* v. *Lohmas*, 31 Cal. 154.

Jo. HAMILTON and W. H. BULLOCK for respondent, argued to the contrary; and upon the last point cited 30 Cal. 202; *Jackson* v. *Woodruff*, 1 Cow. 286; *Livingston* v. *Peru Iron Co.*, 9 Wend. 511.

By the Court, SANDERSON, J.:

The plaintiff having obtained his alleged interest in the Independent Tunnel Company's claim by purchase, which purchase was evidenced by a deed or bill of sale, was bound to produce his deed or bill of sale for the purpose of proving his title—that being the best evidence—or prove its loss for the purpose of laying a foundation for the introduction of secondary evidence as to its contents: *Patterson* v. *Keystone Mining Company*, 30 Cal. 365. The evidence of the loss was insufficient. It showed that in all probability the bill of sale was left in plaintiff's store at Yorkville at the time the plaintiff sold out and delivered possession of the store and its contents to his nephew. His nephew, at the time of the trial, was in the county and in reach of the process of the court, yet he was neither called as a witness as to what had become of the bill of sale, nor does it appear that he was ever questioned by the plaintiff touching the missing document. It is true that the plaintiff searched the store about a year after the nephew took possession, but that was not sufficient. Under the circumstances detailed by the plaintiff, which are very similar to those presented in the case just cited, inquiry should have been made of the nephew for the missing document in order to sufficiently establish its loss. It does not appear that any search was made for the purpose of this trial.

In view of the fact that the plaintiff acquired his interest by purchase, as stated by his counsel in opening the case to the jury, and not by virtue of his being one of the original members of the company who located the claim, we are at a loss to perceive how the testimony of the witness Deiner as to the fact that the plaintiff had acted as a member of the

company, or of the plaintiff himself as to the payment of assessments, or of the books of the company showing that the plaintiff had acted and been received as a member of the company, can be regarded as competent and relevant. Undoubtedly this testimony would have been competent and relevant had the plaintiff claimed title as an original member of the company, for it would have tended to prove that he was a member of the company, and therefore that he held an interest in the claim by virtue of the company's location, But in view of his admission that he had acquired his interest by purchase from some one or more of the original locators. which admission does not seem to have been afterward withdrawn, we think he was bound to make title by proof of his purchase—either by the production of his deed or bill of sale, if he had one, or by proof of a verbal sale and delivery of possession, if the purchase was made prior to the passage of the act of April 13, 1860: Statutes, p. 175; *Patterson* v. *Keystone Mining Company*, 30 Cal. 363; *Goller* v. *Fett*, 30 Cal. 481.

The court did not err in excluding the record from the court of A. B. Scott, justice of the peace for township No. 5, as evidence of the defendant's title. While the statute, in cases where two or more persons are associated in any business and transact such business under a common name, allows suit to be brought against them by such company name, it does not allow suit to be brought against them by a company name which is not the name under which they transact their business. The statute is in derogation of the common law, and must be strictly construed. As appears upon the face of the record, the action was commenced, not against the Independent Tunnel Company, but against the Independent Company, which is certainly a different name. True, the justice addressed the summons to the Independent Tunnel Company, but this he had no right to do. On the contrary, he should have followed the style given in the complaint, or its substitute, the account which had been filed as a complaint and which was against the Independent Company: *Lamping* v. *Hyatt*, 27 Cal. 102. The return shows that the summons was served on Randall, a member of the Independent Company, and not of the Independent Tunnel Company. This

was no service upon the latter company. True, the court entered judgment against the Independent Tunnel Company, but this the court had no power to do, for the judgment was by default: *Lamping* v. *Hyatt*, *supra*. Had the company, appeared and pleaded the misnomer in abatement, if it was a misnomer, or waived it by not pleading it, the result might have been different. But as it is, the record fails to show either an action against or a service upon the Independent Tunnel Company, and the judgment was therefore utterly null and void: *Mayo* v. *Ah Loy*, 32 Cal. 477. Nothing can be presumed in favor of the jurisdiction of the court. Being an inferior court, its jurisdiction must be made to appear affirmatively. The defendant was bound to show that the court had jurisdiction. This the record offered did not prove, but quite the contrary.

Nor did the court err in excluding the judgment, the constable's deed to Garrison, and the assignment of the constable's deed by Garrison to the defendant, when offered, as tending to show color of title under the statute in relation to adverse possession. The instrument from Garrison to the defendant was not a deed of the mining claim, but merely an assignment of "his right, title and interest in and to" the constable's deed, and not to the land therein described. Title passes by deed and not by an assignment of the deed to the assignee. Whether, had Garrison conveyed to the defendant, the judgment and constable's deed in connection with such conveyance would have been admissible as showing color of title in aid of the defendant's plea of the Statute of Limitations, it is therefore unnecessary to determine. But upon this point see *Jackson* v. *Woodruff*, 1 Cow. 286, and *Gilbert* v. *Peru Iron Company*, 7 Wend. 511.

Judgment reversed and a new trial ordered.

REAMER v. NESMITH ET AL.

(34 California, 624. Supreme Court, 1868.)

An appeal which rests upon the Statute of Limitations will not be considered if the transcript fails to show when the action was commenced.

An appeal on the ground that the evidence fails to sustain the verdict will be disregarded if the statement fails to specify the particulars in which the evidence is claimed to be insufficient.

Certain extrinsic evidence essential to the understanding of conveyances. Parol evidence is always admissible (1) to identify the land conveyed with the land described; and (2) to explain the latent meaning of the language used in describing it.

Parol explanation of calls and terms in deed. In an action involving title to a mining claim, plaintiff offered a deed conveying "all that certain piece of mining ground situated in Comer's field, on Swindle Hill, south of the road leading from Yankee Jim's to Todd's Valley, known as the Booth claims and marked by stakes and corners, four hundred feet front, more or less, and running back into the hill," which deed it was alleged covered the ground in dispute: *Held*, that parol evidence should have been allowed to show the relation of all the calls in the deed.

Idem—Surplusage—Meaning of miners' phrases. If part of the claims were north of the road, there might still be enough true calls to enable the false to be rejected as surplusage; and that the phrase "running back into the hill," might be shown to be a mining term and its meaning explained.

Appeal from the District Court of Placer County, Fourteenth Judicial District.

This was an action by plaintiff, who claimed to be owner of and in the possession of certain mining claims, known as the Swindle Hill claims, on Swindle hill, near Yankee Jim's, to determine an adverse claim thereto by defendants. Defendant Nesmith alone answered, by disclaiming as to all of said claims, except a certain portion thereof particularly described as constituting the Booth claims, to which he made claim of title, and pleaded the Statute of Limitations as against plaintiff's right of recovery. On the trial defendant deraigned title from Andreas and Beittiman, from whom he produced in evidence a deed, and after its introduction offered to prove that by the term "running into the hill" was meant, in the mining parlance of the vicinage, running to the center or summit of the hill. The evidence so offered was objected to by plaintiff as irrelevant and incompetent, as tending to vary and contradict the terms of the deed, which objections were sus-

tained, and the defendant excepted. The plaintiff had judgment in the court below, and defendant Nesmith moved for a new trial, which was denied, and appealed from the judgment and the order denying a new trial.

The other facts are sufficiently stated in the opinion of the court.

Jo. HAMILTON, for appellant.

CHARLES A. TUTTLE, for respondent.

By the Court: SANDERSON, J.

So far as the case of appellant rests upon the Statute of Limitations, we are unable to consider it, for the reason that the transcript fails to show when the action was commenced. This defect in the transcript was discovered at the argument, and counsel stipulated that the appellant might obtain the certificate of the clerk below as to the date at which the action was commenced, and make the same a part of the transcript. This, however, has not been done, and we are, therefore, unable to determine whether the case falls within the statute or not.

The point that the evidence fails to sustain the verdict must also be disregarded, because the statement fails to specify the particulars in which the evidence is claimed to be insufficient: Practice Act, Sec. 195.

The case seems to have turned mainly upon the construction of the deed from Andreas and Beittiman to the defendant, the question being whether the ground in dispute is covered by the description in the deed.

The case shows that the land in dispute lies upon the side of Swindle hill, in Yankee Jim's mining district, Placer county, being crossed near its lower line by the road leading from Yankee Jim's to Todd's valley, which road runs along the side of the hill, with a front, as it is called, of about four hundred feet, and running back to the summit or center of the hill. The description given in the deed is as follows: "All that certain piece of mining ground situated in Comer's field, on Swindle hill, south of the road leading from Yankee Jim's to Todd's valley, known as the Booth claims, and marked by stakes and corners, four hundred feet front, more

or less, and running back into the hill." In view of this description, the court below charged the jury that no part of the ground lying above or north of the road was included in the deed. In this, we think, the court was in error.

For the purpose of determining the question, it was competent to ascertain by extrinsic evidence the precise location of the land in dispute, and also the several calls or descriptions in the deed. For that purpose, extrinsic parol evidence is always admissible, for in no other way can effect be given to the deed by applying it to the subject-matter. Parol evidence was, therefore, admissible—the true location of the ground in dispute having been agreed upon, or otherwise ascertained—to show the true location of all the descriptive designations and calls named in the deed. This being done, it will be found that all of the descriptive terms found in the deed apply to the land in dispute, or that they do not; if the latter, the land has not passed by the deed; but if some of them apply to the land, and the others do not, then, if those which do apply describe the land with sufficient certainty, the land has passed, for those which do not apply may be rejected as false. This must be done in order to give effect to the intent of the parties; and as ancillary to this, it is also competent to explain by parol testimony the meaning of expressions used in the deed for the purpose of describing the land which do not convey a definite meaning without such explanation: Starkie on Evidence, with notes by Sharswood, 612. It was, therefore, competent for the defendant to show by parol testimony the precise location of Comer's field, the road from Yankee Jim's to Todd's valley, the ground known as the "Booth claims," and what is the full meaning of the expression "running back into the hill." This having been done, if it appeared that some of these descriptions applied to the land in dispute, and others did not, the court was bound to reject the latter and look only to the former, and if they describe the land with sufficient certainty, to hold that it passed by the deed: *Reed* v. *Spicer*, 27 Cal. 57; *Mulford* v. *Le Franc*, 26 Cal. 88.

The testimony shows that the road from Yankee Jim's to Todd's valley crosses the land in dispute near its lower line; that Comer's field is below or south of the road; that the

ground known as the "Booth claims" lies both below and above the road, and extends to the center or summit of the hill; but what is the precise meaning of the phrase "running back into the hill," when used as descriptive of a mining claim, does not appear from the testimony. That phrase may or may not have conveyed a clear and definite idea to the court below. If not, it was competent for the court to hear parol testimony for the purpose of explaining its meaning. It is not an expression in common use in deeds for the purpose of describing land; but it may be in use among miners for the purpose of describing their mining claims, and may have, among them, a certain and definite meaning. If so, that meaning should have been ascertained, and full force given to it by the court in construing the deed. The same expression is used in the pleadings, and seems to be there used for the purpose of describing the claim as running back to the center of the hill, or to the summit of the hill. The expression, in connection with the custom of miners in locating and describing hill claims, may have that meaning; and if so, that meaning should be given to it in the construction of the deed. On its face the expression, to one entirely unacquainted with the mining business and the mode of locating and working mining claims, might be unintelligible and yet be capable of having a meaning annexed to it by extrinsic evidence. If so, the extrinsic evidence should be received. It may have a definite and certain meaning among miners, like mercantile terms among merchants, which are not intelligible to others. Mercantile terms, abbreviations, words of a foreign language, technical and scientific terms, not generally understood, may be explained by parol evidence, if otherwise unintelligible to the court. So, if the terms or expressions are peculiar to a particular business or calling. They do not fall within the general rule that patent ambiguities can not be explained by parol: Starkie on Evidence, 591.

If a custom exists among miners, in locating tunnel or hill claims, of establishing a front line from which they run back to a perpendicular plane dropped from the center line of the summit, such custom might explain the meaning of the phrase, "running back into the hill." Thus parol evidence

was admitted to show that by the custom of the country the word "thousand," when applied in a lease to rabbits, meant 1,200: *Smith* v. *Wilson*, 3 B. & Adol. 728.

By a charter a vessel with a cargo of coals to Algiers was to be unloaded at a certain rate per day, and if detained longer the charterer was to pay so much per day from the time of the vessel being ready to unload and "*in turn to deliver.*" Evidence to show that, in the port of Algiers those words had acquired a particular meaning, was held admissible: *Robertson* v. *Jackson*, 2 C. B. 412. So, to show what is the meaning, in a bill of lading, of a delivery "*in London*": *Bourne* v. *Gatliffe*, 3 M. & G. 643. In *Lilly* v. *Ewer*, Dougl. 72, evidence of merchants was admitted upon the question whether "*sailing with convoy*" meant for the whole voyage or not.

We think those cases are upon all fours with the present, and that the defendant should be allowed to show, if he can by extrinsic evidence, that the words "running back into the hill," in miners' parlance mean running back to the center or summit of the hill.

So far as the case now shows, "Comer's field" and "south of the road from Yankee Jim's to Todd's valley," are, in part at least, false calls. If so, they must be, so far, disregarded. But the remaining calls may be sufficient, when consulted in the manner already suggested. We are unable to perceive, so far as the case now shows, why the remainder of the description, "said claim is known as Booth's claim, marked by stakes and corners, four hundred feet front, more or less, and running back into the hill," is not applicable to the ground in dispute and sufficiently certain for all the purposes of description.

Judgment and order reversed and new trial granted.

REES v. JACKSON.

(64 Pennsylvania State, 486. Supreme Court, 1870.)

Purchase of oil stock induced by forged telegram—Case for jury. R. received a forged telegram purporting to come from S., by which he was led to purchase oil stock of J., and gave his note in part payment of the purchase price. In a suit upon the note by J., the defense was that the forged telegram was procured to be sent by the plaintiff. The telegram was offered in evidence by the defendant, but ruled out on the ground that the plaintiff had not been shown to be connected with the sending of it, and the court directed a verdict for the plaintiff. *Held*, that although there was no direct proof that J. knew of the sending of the telegram, yet it was a link in a chain of circumstances developed on the trial sufficiently strong to require its admission in evidence, and the submission of the case to the jury.

Questionable cancellation of stamps on note. A note sued upon was proved to be executed by the defendant, and the requisite amount of revenue stamps were upon it, canceled with defendant's initials; but it was doubtful whether some of the initials were in defendant's handwriting. *Held*, that this was clearly *prima facie* evidence to carry the note to the jury, and sufficient to prevent the court from taking from the jury the fact of an authorized cancellation.

Error to the Court of Common Pleas of Monroe County.

This was an action of assumpsit by A. Reeves Jackson against William S. Rees, brought January 2, 1868, on a promissory note dated July 24, 1865, drawn by the defendant in favor of the plaintiff for $2,250, payable fifty days after date. The note was part of the consideration for 500 shares of the stock of the Pennsylvania Imperial Oil Company. The defense was that the defendant was induced to purchase the stock by means of a forged telegram, purporting to have been sent by Dr. W. D. Stroud, of Philadelphia, which it was alleged, the plaintiff had procured to be sent to him. Both parties were residents in Stroudsburg.

The cause was tried February 25, 1859, before BARRETT, P. J.

The note had on it four 25-cent revenue stamps, and three of 5 cents; on each of the stamps were the initials "W. S. R." A witness for the plaintiff called to prove the defendant's signature to the note, testified on cross-examination that the

initials on the larger stamps were made by the defendant; that he could not say the smaller ones were his; they differed from the others and from the signature. The defendant on this account objected to the admission of the note in evidence. The court admitted it, and sealed a bill of exceptions. The plaintiff having read the note, rested.

The defendant then gave evidence that a dispatch from the line of the American Telegraph Company, dated July 24, 1865, and shown to witnesses, had been received at 3:30 P. M. on the day of its date, at the Stroudsburg depot, about a mile from the town; that the operator employed Charles Troch to carry it to the defendant; that he delivered it to the defendant in presence of J. H. Stroud, and that both read it; this was after dark of the day.

J. H. Stroud testified that after dark on the 24th of July, and after reading the dispatch, the defendant went down toward the plaintiff's office, and returned in a short time and showed witness a certificate for 500 shares of oil stock with the name of the plaintiff signed to the transfer; that the witness, who was cashier of the Stroudsburg bank, next day cashed a check (which he identified), dated July 24, 1865, drawn by defendant in favor of plaintiff, written on the face "payment on Penna. Imperial oil stock, 500 shares," and indorsed by plaintiff. The defendant then read the check in evidence.

S. S. Dreher (the certificate of stock and indorsed transfer being shown him) testified that he was the witness to the transfer; that on the Tuesday or Wednesday previously to the transfer, which was on Monday, the plaintiff told him he had been thinking of going into a mining company and would like to dispose of some of his Imperial oil stock; he asked witness if he knew any one who wished to buy; witness said he did not, unless it was Mr. Rees, who had recently purchased some from Esquire Botree; witness told plaintiff he was under the impression that defendant had got his information about the stock from Dr. Stroud; plaintiff asked witness to tell the defendant that he had his stock for sale; witness on the next Saturday, which was the Saturday before July 24, 1865, told defendant that the plaintiff wanted to sell his Imperial oil stock.

B. S. Jacoby testified that in conversation with the plaintiff on the afternoon stock was transferred to the defendant, it was said the defendant wanted to buy some Imperial oil stock; witness wanted plaintiff to sell witness's stock; plaintiff said, "Rees is coming into my office to-night, and I will speak to him about it. He said he wanted to sell his. In the evening of that same day I went into Dr. Jackson's office after supper. We talked over the matter again. I told him I was very anxious to sell mine—would like to have the money for it. I told him I would sell mine for $5.25. He said I was foolish, as I could as well get $5.50. He said he would not sell his for less than $5.50. He said after he had sold his to Rees at $5.50 he would mention to him that he could have mine at $5.25. While we were talking Rees came into the office and the conversation ceased on that subject. I remained in a while. I think Jackson stepped out for a short time. After he came back I left the office and left the doctor and Rees in the office. I saw Dr. Jackson again that evening in front of Marsh's Hotel. He came from toward his office and stopped. He called me to one side and told me that he had sold his stock to Rees, and he said 'you can sell yours to him if you give him time.'"

Dr. W. D. Stroud testified that he was a cousin of plaintiff's wife and a cousin of defendant; he never sent the dispatch to defendant or any other about oil or anything else; a few days after the date of the dispatch, witness and defendant went to the office of the American Telegraph Company, and in company with G. W. Meyers, a clerk in the office, searched among the messages and could not find the original of the dispatch.

Meyers testified that the dispatch had been brought to the office by a boy in July, 1865, and described the appearance of the paper containing the dispatch.

J. Merrihew, manager of the telegraph company, testified, from the books of the company, that a dispatch from W. D. Stroud to W. S. Rees, Stroudsburg, was sent from their office on the 24th of July, 1865; that he had searched diligently and had been unable to find the original.

M. L. Able testified that in July, 1865, he was employed in the office of James Boys, a stock broker in Philadelphia; that

he carried a dispatch for Boys in July, 1865, to the American Telegraph office, signed W. D. Stroud, addressed to William Rees, Stroudsburg, and gave it to Meyers; the description of the paper was similar to that given by Meyers; it was to buy oil stock; witness never took any other dispatch for Stroudsburg, nor carried any other dispatch for Boys to that office; all the other dispatches of Boys were sent to the Bankers & Brokers Telegraph office; witness had seen plaintiff three or four times at Boys' office in the summer of 1865; had heard Boys speak of defendant and Dr. Stroud before that.

The defendant gave in evidence, by other witnesses, that they had frequently seen Boys and the plaintiff together familiarly and intimately.

The defendant offered in evidence the telegram, with the record from the telegraph office, as proved by Merrihew. The telegram was as follows:

"July 24th, 1865. Received 3:30 P. M. By telegraph from Phila.

"To WM. S. REES, Stroudsburg:

"No 1. The Penna. Imperial have made a big strike. Buy all the stock you can under ten (10) dollars.

"WM. D. STROUD."

The offer was objected to, rejected and a bill of exceptions sealed.

He then gave in evidence the certificate of 500 shares of Imperial oil stock, with transfer indorsed in blank, signed by plaintiff, and dated July 24, 1865.

He offered to prove that at the date of the transfer the stock was without value. He again offered the telegram and telegraph book, to be followed by evidence that as soon as defendant discovered the forgery, and within a week after the note was given, he offered to return the stock to the plaintiff on receiving back the note and money, informing him that he had purchased on the faith of the telegram, which proved to be a forgery; also to prove that the oil company had not made "a strike," and the stock was valueless; also that Boys was a fugitive from justice on account of having sent the dispatch. All these offers were rejected by the court, and several bills of exceptions sealed.

The court charged: * * "The note upon its face imports a consideration. It is alleged that it was given for a purchase of oil stock, and that the stock was at the time worthless. Something more must be shown to effect the consideration. If it was a fair sale the consideration was fixed by the buyer, and he is concluded by it. Either fraud or mistake must be proved to avoid the payment of the note. The law presumes that the defendant was aware of what he was doing when he made the contract. If there was deceit, misrepresentation or fraud of any kind made use of to effect the sale or procure the note, it would be a good defense. Fraud is alleged, but the burden of proof is on the defendant to show it. That a forged dispatch was received by Rees from Philadelphia on the day he made the purchase is in evidence. Upon the receipt of the dispatch he immediately called on the plaintiff and purchased his stock. He was acting, as he supposed, on private information. If it had been true he would have made a good bargain off the plaintiff. As it turned out to be untrue, he made a bad bargain for himself. The evidence in relation to the dispatch was admitted under objection, but with the promise that the plaintiff should be connected with the writing and sending of the dispatch before it was offered in evidence. The dispatch being between other parties, and being wholly irrelevant to this issue, unless the plaintiff's connection with it could be shown, the largest latitude has been given to the defendants for the purpose of enabling them to make the plaintiff responsible. [He has failed to show that Dr. Jackson was even in a position to direct it, and having failed to do so, it became the duty of the court to reject the dispatch as evidence.] Even if the dispatch could have been admitted in evidence it could not have affected the plaintiff's right to recover unless he was implicated in the act of sending it. Suspicion, however strong, is not evidence. No other fraud is alleged except that connected with the dispatch. [There being no evidence of plaintiff's complicity with the act, there is no evidence to go to the jury on the subject.] [We can not submit a fact to the jury to be found in relation to which there is no evidence, and that is this case.]

"Although the stock may have been, as time has shown, wholly worthless, it is no defense to this action, unless there

was either mistake or fraud. If the defendant in the purchase exercised his own judgment, uninfluenced by any improper conduct on the part of the plaintiff, no matter where or how he obtained his information, he must suffer the consequences. The law can not relieve him from a mere bad bargain. Having failed to make such a defense [the jury are instructed to find a verdict in favor of the plaintiff for the amount of the note and interest.]"

The verdict was for the plaintiff for $2,715.

The defendant took out a writ of error, and assigned for error the admission of the note, the rejection of his offers of evidence and the portions of the charge of the court inclosed in brackets.

W. DAVIS and H. GREEN, for plaintiff in error. The plaintiff should have proved affirmatively the cancellation of the stamps: Act of Congress July 13, 1866: *Tripp* v. *Bishop*, 6 P. F. Smith, 424; *McGovern* v. *Hoesback*, 3 Id. 176; *Walsh* v. *Carwell*, Leg. Int. April 24, 1868, p. 33; *Wigham* v. *Pickett*, Am. L. Reg. November, 1869, p. 701. Fraud in fact is purely a question for the jury: *Garrigues* v. *Harris*, 5 Harris, 350; *Repsher* v. *Wattson*, Id. 368; *Thomas* v. *Thomas*, 9 Id. 317; *McIldowny* v. *Williams*, 4 Casey, 492; *Kaine* v. *Weigley*, 10 Harris, 183; *Balt. & O. Railroad* v. *Hoge*, 10 Casey, 214. Frauds do not ordinarily admit of direct proof; things remaining unproved as well as those proved may be evidence in a case: *Myers* v. *Hart*, 10 Watts, 104; *Stauffer* v. *Young*, 3 Wright, 459; *Huntzinger* v. *Harper*, 8 Id. 204; *Deakers* v. *Temple*, 5 Id. 242; *Dark* v. *Hanks* (cited) Chitty on Bills, 265; *Maples* v. *Browne*, 12 Wright, 458.

S. HOLMES, JR., and E. J. FOX, for defendant in error. The court should not submit to a jury what would at most but produce a suspicion of a fact: *Stouffer* v. *Latshaw*, 2 Watts, 167; *Malson* v. *Fry*, 1 Id. 435; *Bradley* v. *Grosh*, 8 Barr, 49; *Moore* v. *Miller*, Id., 285; *Gilchrist* v. *Rogers*, 6 W. & S. 488; *Stine* v. *Sherk*, 1 Id. 201; *Irwin* v. *Shoemaker*, 8 Id. 76; *Beuford* v. *Sanner*, 4 Wright, 10.

AGNEW, J., delivered the opinion of the court.

In ruling out the telegram of the 24th of July, 1865, to the defendant, the court severed only the link between the note in suit and the fraud that begat it. It is on this ruling only that the refusal of the offer of the transfer of the stock as the consideration of the note can be supported. Indeed, there was already ample evidence in the case of this as the consideration, consisting of the admissions of Jackson of the sale of the stock on the 24th of July, the number of shares, and price of $5.50 per share, the clerk writing the sale of 500 shares, the note for $2,250, and the transfer indorsed on the certificate, all dated on the same 24th day of July. Nor can there be any doubt that the forged and fraudulent telegram induced Rees to buy the stock. There is ample evidence of this in the testimony of James H. Stroud and Benjamin S. Jacoby. The only question, therefore, is whether Jackson was privy to the sending of the telegram to Rees. There was sufficient evidence of this fact to be submitted to the jury. It was not a mere spark dying out in the moment of its birth, but a stream of light thrown directly upon the plaintiff, the strength and clearness of which the jury alone could determine. Men have been convicted and punished on circumstances not more strong. Let us examine the evidence with a view to see whether it had sufficient strength to carry it to the jury. That the telegram was false and fraudulent is clear. That it came from one Boys, a broker in Philadelphia, is evident. These being clear facts, the inquiry arises and must be answered satisfactorily, how did it happen Boys should address Rees in Dr. Stroud's name just at the moment when Jackson was anxious to sell Imperial oil stock, and to invest in mining stock? Why did Boys think of Rees at all? How did he know that Rees would buy stock, and how did he know that he wanted Imperial oil stock? Boys lived in Philadelphia and Rees in Stroudsburg, a hundred miles or so apart. And if by any possibility we might suppose Boys knew these things, by some act of divination or spiritualistic insight, how did he know or think of Dr. Stroud as a fit person to influence Rees? And what motive had Rees to act at all? It seems to be impossible to answer these questions except on one supposition, viz.: that some one made the suggestion to Boys. A jury would be justified in this conclusion,

and then the inquiry would be, who made the suggestion? The first and most natural conclusion on the evidence would be that it came from some one in Stroudsburg, who had an interest in the result. Up to this point a jury would scarcely hesitate, and then the question is, does the evidence point to the plaintiff? Who had a motive to act on Rees? Jackson was the owner of Imperial oil stock, and desired to sell it. This is the kind of stock mentioned in the telegram. Who was likely to think of Rees as a purchaser of this stock? Jackson had inquired for a purchaser, and was told Rees would probably buy it. Who was operating on Rees to buy before the telegram came? Jackson sent word to Rees that his Imperial stock was for sale. But Rees failed to come at this call. Some days intervened—this is evident, for Dreher delivered Jackson's message on the Saturday previous to the 24th of July; and it was on the Tuesday or Wednesday preceding that Jackson spoke to Dreher. Failing to respond to the message, how was Rees to be influenced to buy? A big strike of oil and a telegram were natural means. Who thought of Dr. Stroud?

In the conversations between Jackson and Dreher the latter had told Jackson, that in buying Botree's stock, he thought Rees was acting on information from Dr. Stroud. Who is Stroud? The cousin and friend of Rees and a cousin of Jackson's wife. Who, then, was so likely to be thought of as Stroud, or one so fit for the purpose? But a fit instrument to operate in Philadelphia must be found. That Boys was the man is indisputable, for he did it. This is followed by the proof that Boys and Jackson were acquaintances and associates, and that Jackson visited Boys' office in Philadelphia several times in the summer of 1865; and if the witnesses are believed, their association was of the free and easy kind. So far, the evidence affords considerable probability to the belief that Jackson made the suggestion to Boys to send the telegram to Rees. But in cases of circumstantial evidence there is generally one fact which forms the clinch, and gives a decisive effect to the whole chain. That fact seems to be so here. The telegram arrived at the depot, about a mile away, at 3:30 P. M. It was given by the operator to Troch, to be handed to Ross. Troch did not deliver it till about 8 o'clock,

at dark. In a few minutes Rees started off directly to Jackson's office, found him and Jacoby there, and the stock was purchased the same evening. But Jacoby, the same person, and therefore there is no room for a mistake of time, testifies that in the afternoon of the same day Jackson told him that Rees was coming to his office that night, and he would speak to Rees about the purchase of Jacoby's stock, of which they were then talking. How did Jackson know that Rees would be at his office that night? It was a week or more before that he had sent the word by Dreher to Rees. There is no evidence of any previous arrangement, or conversation about the stock. It was evidently the telegram of the big strike of the Imperial which set Rees in motion, and this was not till dark. How then did Jackson know in the afternoon that Rees was to come to his office, unless attributable to the presumed effect the telegram would have on Rees? If this be so, and the jury and not the court must determine the fact, it is evident that Jackson has furnished evidence of his own knowledge that such telegram would be sent to Rees. Admitting then that fraud is not to be presumed or to be found on vague or slight conjecture, and that the doctrine is exploded, as we have said several times, of the sufficiency of a mere spark or scintilla of evidence to go to the jury, yet we have here a chain of circumstances strong enough to bear the weight of the case into the jury box and lodge it there for their decision. How far it is full of proof of the plaintiff's complicity it will be for the jury to say. This carries with it all the other assignments of error except that as to the stamps. As to it we think there is no error in receiving the note in evidence. The signature to the note was the defendant's, and the initials on the larger stamps were his; and the note was stamped to the requisite amount. This was clearly *prima facie* evidence to carry the note to the jury. The *prima facie* presumption arising from the execution of the note, the full amount of stamps affixed, their actual cancellation, and the initials of the defendant on a part of the stamps, would prevent the court from taking from the jury the fact of an authorized cancellation of the smaller stamps.

Judgment reversed and venire facias de novo awarded.

BRAGG v. GEDDES ET AL.

(93 Illinois, 39. Supreme Court, 1879.)

Merger of prior and contemporaneous agreements in written contracts. B. and S. entered into a written agreement to dissolve their real estate copartnership: *Held*, that all prior and contemporaneous agreements between them as to the terms of dissolution were merged in the written agreement.

Interested witnesses under chancery practice. Under the old chancery practice a complainant might obtain an order to examine a defendant, and a defendant a co-defendant, as a witness, upon an affidavit that he was a material witness and was not interested on the side of the applicant, in the matter as to which it was proper to examine him, but if so interested, his evidence could not be admitted.

Interested witnesses under statute. In a suit against the trustee of a legatee under a will, and the legatee and others, based upon a former partnership between the complainant and the testator and others in which there was a prayer for an accounting, etc., it was sought to introduce the testimony of the defendant copartners on behalf of the complainant as to facts which occurred before the death of the testator: *Held*, that under the statute relating to interested witnesses their testimony was incompetent.

Where a material allegation of the bill is positively denied by answer under oath, it must be established by proof sufficient to overcome the answer and opposing evidence.

Inference of witness. The testimony of a witness that he took from what a party said that such party and another were partners, etc., is not evidence. It is a mere impression or inference.

Acts and declarations of incompetent witnesses. If a partner, when called against his co-defendant to establish the partnership, is not a competent witness, his acts and declarations are equally incompetent for that purpose.

Admissions of trustee prejudicial to his trust. Admissions made by a trustee to the prejudice of the trust fund and against the beneficiary are not competent evidence in a suit against the trustee and his *cestui que trust*.

Verbal admissions of a party are to be received with caution. Such evidence is liable to much imperfection and mistake and frequently is entitled to but little weight.

Resulting trust. There can only be a resulting trust where property is acquired and held in the name of one person, which, in equity, belongs to another, and this can not be true of property given to an individual for his own use.

Appeal from the Appellate Court of the First District; the Hon. THEODORE D. MURPHY, presiding Justice, and the Hon. GEO. W. PLEASANTS and Hon. JOS. M. BAILEY, Justices.

Frederick A. Bragg filed his bill in equity in the Superior

Court of Cook county, on the 25th day of May, 1876, against Peter Geddes and John Sheriffs, executors of the last will and testament of James Smith, deceased, William B. Smith, son and legatee of said James Smith, deceased, James Steele, and Joseph R. Putnam, administrator of the estate of Tarleton Jones, deceased, for an account and settlement of partnership transactions.

It is alleged that, in the spring of 1868, the complainant, and James Smith, now deceased, entered into a copartnership, for a term of three years, for the purpose of carrying on "a general business as real estate brokers, in the city of Chicago, buying and selling real estate on account of said copartnership, and on commission, negotiating loans, buying and selling real estate securities, paying taxes, and all other matters and things that usually pertain to the operating of a general real estate agency, and loan and brokerage business." The name and style of the copartnership was "F. A. Bragg & Co." The complainant was to have the exclusive management of the business, and was to devote his entire time, attention, skill, knowledge and influence thereto, which was his contribution to the capital stock of the copartnership, in lieu of money, and for which he was to receive one third of the profits arising from the business, and a one third interest in all the investments of the copartnership made on their own account. Smith was to contribute to the copartnership business all the cash capital needed in and about the business to enable the complainant to purchase, on account of the copartnership, at the most favorable and profitable bargains that might offer, real estate, within a reasonable amount; and Smith was to have two thirds of the profits of the business and two thirds of the real estate purchased on account of the business; that upon the execution of the written contract for the copartnership the complainant rented and fitted up, at a large expense, an office, and opened the same for said copartnership business, under the said firm name and style of F. A. Bragg & Co.; that "through the influence, constant exertion, skill, management and industry of the complainant, the copartnership business became well founded, and was constantly increasing and growing;" that in the fall of 1868, while said business was increasing and becoming more prosperous, said Smith and the complainant

became "satisfied that safe and most profitable investments could be made in mineral lands" in the territory of Utah and its vicinity, and the complainant was induced to advise that F. A. Bragg & Co. should become interested in and operate mining lands in Little Cottonwood mining district, in the territory of Utah, where successful prospecting and testing was being carried on, being in the same locality where the "Emma" mine, so called, was subsequently discovered; that it was thereupon agreed by complainant and Smith, as co-partners as aforesaid, to enter into said mining speculations; that complainant presented the subject of investing in said mineral lands to James Steele, Tarleton Jones and John Sheriffs, and thereupon the said firm of F. A. Bragg & Co., consisting of the complainant and said Smith and said Steele, Jones and Sheriffs, agreed to unite and embark in said mining speculations; and that all the mineral lands bought by said parties should be for the mutual benefit, share and share alike, of said Smith, Steele, Jones, Sheriffs and the complainant; that the said office of F. A. Bragg & Co. was to become the office of the new combination, and was used by them, free of charge, so long as the firm of F. A. Bragg & Co. continued; and, after the dissolution, the private office of the complainant was made and constituted the office of the new copartnership.

It is further alleged that Steele, Jones and Sheriffs paid into the firm of F. A. Bragg & Co., for the purpose of investment in said mineral lands, from time to time, considerable sums of money, and that the firm of F. A. Bragg & Co. paid its proper proportion of the amount of money to be raised for the purpose of investing in said mineral lands and prospecting and operating the same, all of which was to be invested in the interest and for the benefit of said F. A. Bragg & Co., Steele, Jones and Sheriffs, under the arrangement and agreement before stated; that in the month of October or November, 1868, complainant caused to be entered, in the names of James Smith, James Steele, Tarleton Jones, John Sheriffs and complainant, jointly, certain claims to mining lands in the Little Cottonwood mining district, which were known and designated as the "Minna and Minerva" mining claims or lodes; that in April, 1869, complainant, Smith, Steele, Jones and Sheriffs agreed that Smith should go to Utah

to investigate, develop, operate, buy and sell mining claims and lands, as the same might appear for the best interests and benefit of all parties concerned; that it was thereupon agreed between complainant and Smith that they would close their real estate partnership business, and dissolve the said partnership as entered upon in the spring or summer of 1868, for the purpose of carrying on a real estate business in the city of Chicago, as before stated, for the purpose of consolidating and utilizing all the time, efforts and skill of the complainant, as well as said Smith, in the direction of prosecuting the said mining interest; that Smith proposed that, if complainant would consent to and close the real estate business and firm of F. A. Bragg & Co., so far as the same related to real estate in Chicago, so that Smith could devote himself and his spare means entirely to the more extensive copartnership of mining and mineral lands, so that he (Smith) could remove to Utah as the representative of the joint interest of that copartnership, then, and in that case, complainant should have his equal share with said Smith, Steele, Jones and Sheriffs, and a joint interest in all purchases or investments made by Smith in the Territory of Utah, and in profits to accrue therefrom; and that, in all of the same, complainant, Smith, Steele, Jones and Sheriffs were to have an equal interest and benefit, jointly, share and share alike; that in consideration thereof, on the first day of May, 1869, the copartnership of F. A. Bragg & Co., so far as the same related to real estate investments in Chicago, was dissolved, and complainant afterward relinquished to Smith all of his interest, of every kind, in certain investments which complainant had made for the firm of F. A. Bragg & Co., and out of which large profits have accrued to Smith, in his life-time, and since his death; that complainant, as a further consideration for the dissolution, and as a part of his contribution to the mineral and mining copartnership business, borrowed or negotiated for Smith a large loan, without commission, to take to Utah, in consideration of all which Smith agreed with complainant faithfully to represent and advance the interest of the complainant in Utah, and that complainant was to have an equal undivided one fifth of all the lands and claims entered or bought by Smith in said territory, and was to have one fifth interest in

all mineral and mining interests, claims, lodes or mines of any kind or nature whatsoever, in which said Smith might invest, purchase or take an interest; and Smith agreed with complainant that, in consideration of the matters aforesaid, he would advance for complainant, from time to time, whatever money might be required to keep and preserve complainant's interest in all the mineral and mining claims that they had acquired, as well as in what should be acquired, and also upon any mining enterprise that might or should be undertaken by said Smith, while in the Territory of Utah, and that the interest of complainant in all should be equal to that of Smith and each of the other parties before named; that in consideration of the agreement of Smith, and the other persons named, complainant did, afterward, convey and release large and valuable interests and investments, made for said firm, to said Smith, and did procure a loan of $6,000 for Smith, without commission thereon; that in the month of May, 1869, Smith went to the Territory of Utah as a copartner and representative of complainant and Jones, Steele and Sheriffs, and at the mutual expense of each of said copartners, with instructions to invest in any valuable mining claims that he might be able to purchase, and to develop and operate the same, if the same could be had and operated at a reasonable price, and within the means of the copartners, and especially to develop and test the "Minna and Minerva" mines.

It is further alleged that Smith, upon his arriving at Utah, abandoned the said "Minna and Minerva" mining claims, and squandered his money in extravagant living and idleness, much of his time being in an intoxicated condition, and in January, 1870, returned to Chicago for more money, and for consultation with the members of the copartnership; that he then induced the copartnership, or the members thereof, to make further advances of money to him, and again returned to Utah in April, 1870; that the money thus advanced to Smith was paid in equal proportions by Smith and the complainant and Steele, Jones and Sheriffs, and that upon Smith's returning to Utah he purchased of one Robert Bruce Chisholm and one Woodman a one-fourth interest in a certain mine then undeveloped, known and called the "Emma" mine, for $200; that the $200 paid by Smith therefor was

furnished and advanced to him by said copartners, and that Smith invested the same in the interest of and as the agent of the copartnership; that Smith, in violation of his agreement with his copartners, and the trust by them reposed in him, took the said one-fourth interest in the said "Emma" mine and the title thereof in his own name, and thereby became, in law, a trustee for the copartnership.

It is further alleged that said mine proved a source of great profit, and Smith derived great gains therefrom; that from that time until his death Smith remained out of the State, intentionally, for the purpose of avoiding a settlement with his copartners; that Smith died testate, and left all of his fortune, consisting of the proceeds of said "Emma" mine, to Peter Geddes and John Sheriffs, his executors, as trustees for the benefit of his son, William B. Smith.

The bill prays for answers under oath, and that an account be taken of the copartnership, etc., and that Geddes and Sheriffs be decreed to transfer to complainant and the other copartners their respective shares of the copartnership estate which they received from Smith.

The bill was sworn to by the complainant.

The joint and several answer of Geddes and Sheriffs admits the entering into copartnership by complainant and Smith, on the 8th of July, 1868, at Chicago, for the purpose of buying and selling real estate, etc., as alleged in the bill; they also admit that the office of such copartnership was kept at the place alleged, but they deny that the firm of F. A. Bragg & Co. (composed of complainant and Smith) and said Steele, Jones and Sheriffs agreed to unite and embark in mining speculations, and that all the mineral lands bought should be for their mutual benefit, share and share alike, as alleged; they also deny that said office of F. A. Bragg & Co. was to or did become or was used, as alleged, as the office of the alleged copartnership, or that it was so used after the dissolution of the firm of F. A. Bragg & Co. They can not answer whether Steele and Jones paid into the firm of F. A. Bragg & Co., for the purpose of investment in mineral lands, any sums of money, but Sheriffs, on his own knowledge, and Geddes, on information and belief, deny that Sheriffs ever paid into said firm of F. A. Bragg & Co. any money, at any time, for said

purpose. They, on information and belief, deny that the firm of F. A. Bragg & Co. paid any money as a proper proportion of an amount to be raised and paid as alleged. The defendants deny, on information and belief, that, at the time alleged, said Bragg entered or caused to be entered, in the name of Smith, Steele, Jones, Bragg and Sheriffs, jointly, said "Minna and Minerva" mining claims or lodes, and said Sheriffs, on his own knowledge, and said Geddes, on information and belief, deny that in April, 1869, or at any time, complainant, with said Smith, Steele, Jones and Sheriffs, agreed that Smith would represent the mutual and joint interest of said parties, and would go to Utah to investigate, develop, operate, buy and sell mining lands and claims as might appear for the best interest and benefit of all said parties as alleged.

The defendants, on information and belief, say that on or about the first day of May, 1869, Smith and complainant united in the execution of certain articles of agreement of that date, a copy of which is annexed to the answer, and thereby and for the consideration therein expressed, and for none other, terminated and dissolved their copartnership.

They also deny, on information and belief, that complainant, as a further consideration for the dissolution of his and Smith's copartnership, and as a part of his contribution to the alleged mineral and mining copartnership business, borrowed or negotiated for Smith a large loan, without commission, to take to Utah, and deny that for the consideration alleged, or otherwise, Smith agreed with complainant faithfully, or otherwise, to represent and advance complainant's interest in Utah; and further deny that complainant was to have an equal one fifth of all the lands and claims entered or bought by Smith in said territory; and they also further deny that complainant was to have one fifth interest in all mineral and mining claims or enterprises, as alleged; and deny that the parties named, by agreements and undertakings as alleged or otherwise, constituted or created a copartnership for mining purposes, as alleged; and deny that thereby, or otherwise, complainant, Smith, Steele, Jones and Sheriffs became and were joint owners and copartners of all mineral and mining interests of every kind, etc., acquired by Smith during his lifetime, in the Territory of Utah, or by any other of the so-called partners.

They further say, on information and belief, that by the agreement of dissolution, the mining interest of complainant was expressly limited to an interest in the "Minna and Minerva" lodes, therein named. They deny that Smith, at any time or in any manner, acquired any interest whatever in said "Emma" mine, with money furnished by the alleged copartnership, or as its agent or representative, or in its interest, or in the joint interest of the alleged copartners; and they affirm, on information and belief, that all the interest in the "Emma" mine ever had, or held, or owned by Smith, was acquired out of his own means, and at all times held and owned by Smith for himself alone, and that complainant never, at any time, had any right, title or interest therein, etc.

This answer was properly sworn to.

Subsequently, by leave of the court, they filed sworn amendments to their answer, denying that after the dissolution of the real estate copartnership between complainant and Smith, a meeting composed of complainant, Smith, Jones, Steele and Sheriffs was held, at which it was agreed or determined that Smith should proceed to the Territory of Utah for the purpose of developing said "Minna and Minerva" mines, and that the expenses incurred by said Smith should be paid by the parties, members of the alleged copartnership, or that it was agreed at such meeting, or at any other time, that all mining property acquired in any manner by Smith, while acting as agent and partner of the alleged copartnership, should be for the benefit and to the use of the alleged copartnership, consisting of Smith, Jones, Steele and Sheriffs and the complainant. And Geddes, upon information and belief, and Sheriffs, upon his own knowledge, deny that Jones, Steele, Sheriffs, Smith and complainant held any meeting whatever, for any purpose, or at any place during the month of May, 1869, after the dissolution of the real estate partnership theretofore existing between complainant and Smith.

They further answer, on information and belief, that Smith, before his return to Utah in April, 1870, informed complainant, Steele and Jones that he had an interest in the "Emma" mine which had been given to him as a present; that he held

and claimed such interest as his individual property, and that no other person or persons had any interest therein or claim thereto; that complainant took no steps to assert any title to or claim in said interest in the "Emma" mine, held by Smith, until it was reported the mine had been sold to one Ralston, of California, for a large sum of money. William B. Smith's answer, on information and belief, denies the material allegations in the bill in regard to the "Emma" mine, and puts them in issue.

Steele and Jones also answered, but, in the view expressed in the opinion, their allegations are immaterial.

Proper replications were filed to the answers.

On final hearing, the superior court decreed in favor of the defendants and dismissed the complainant's bill.

The complainant thereupon appealed to the Appellate Court of the First District. That court, on hearing, affirmed the decree of the superior court, and the complainant now brings the record to this court by appeal and assigns for error—

1st. That the appellate court erred in affirming the decree of the superior court.

2d. The appellate court erred in not reversing the decree of the superior court.

Messrs. G. W. & J. T. KRETZINGER, and Mr. VICTOR MORAWETZ, for the appellant.

Mr. JOHN P. WILSON, for the appellees.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

There can be no question but that all prior and contemporaneous agreements between Bragg and Smith, as to the terms of their agreement of dissolution of their real estate copartnership, are merged in their written agreement. That agreement bears date on the first day of May, A. D. 1869, and after reciting the formation of the copartnership between them, their agreement to dissolve the same, the property acquired and by whom title is held, etc., proceeds in the following words:

"Now these presents witnesseth that the said James Smith, in consideration of the premises, and of the sum of one dol-

lar to him in hand paid by the said Frederick A. Bragg, the receipt of which is hereby acknowledged, does hereby sell, transfer, assign and make over unto the said Frederick A. Bragg and to his assigns, all his, said Smith's, right, title, interest and claim in and to the lease of the said room and basement aforesaid, and in and to the chairs, desks, iron safe and all other furniture and fixtures used in said office or appertaining thereto, to have and to hold the same unto the said Frederick A. Bragg and his assigns.

"And for and in consideration of the premises, and of the sum of one dollar in hand paid by the said James Smith, the receipt of which is hereby acknowledged, the said Frederick A. Bragg does hereby sell, assign, transfer and make over unto the said James Smith, all his (said Bragg's) right, title, claim, interest and demand, in and to all of the outstanding claims and demands of every sort, commissions, real and personal estate and property, mining lands or interests, notes, bonds or obligations, contracts or property, or claims of any and every description whatsoever, held or owned, or claimed by or due or owing to said firm of F. A. Bragg & Co., saving and excepting the three several parcels of real estate and leases of said office, and the furniture and fixtures of the same, hereinbefore particularly described, and the interest in the said Minerva and Minna lodes, hereinbefore particularly described, and in reference to the said hereinbefore described three parcels of real estate, and the said interest in the said Minerva and Minna lodes.

"It is hereby mutually agreed and understood as follows, to wit:

"1st. That upon the said James Smith being fully re-imbursed for all moneys expended by him, or which he may hereafter expend in the payment of the purchase money of, or other outlays in connection with, or on account of the said three several parcels of real estate hereinbefore described, situated in Cook county aforesaid, and the said undivided 600 feet of mining lands situate in Salt Lake county aforesaid (including the necessary proportion of expenses for developing and working said mining lands), with interest upon all sums advanced or expended by the said James Smith as aforesaid, at the rate of ten per cent. per annum; that said Frederick A. Bragg shall be entitled to one third of the net profits

arising from the sale or other disposition of said three parcels of real estate situated in Cook county aforesaid, and to one third of the net profits arising from the sale or working of the said mining lands situated in Salt Lake county aforesaid.
* * * * * * * *

"6th. That in the expenditure of money for the development and operations of the mines hereinbefore described, the said Frederick A. Bragg shall be only liable for such *pro rata* proportion of such expenses as his (said Bragg's) undivided one third interest in said six hundred feet shall bear to the amount expended by other owners for the same purpose, and the said Bragg reserves the right to terminate his liability at any time for further expenses connected with said mines by giving written notice to the said James Smith."

Very clearly Bragg has no claim to a partnership in Smith's interest in the "Emma" mine by virtue of anything to be found here. Here is an express surrender by Bragg to Smith of all his interest in mining lands or interests then owned by them, except as to the "Minna and Minerva" lodes; and there is no covenant or agreement giving Bragg an interest in such property to be acquired by Smith in the future. Smith's obligations to Bragg, in regard to mining property, as defined by this instrument, are limited to the "Minna and Minerva" lodes.

But Bragg, by his amendment to his bill, made on the hearing, alleges that subsequent to the making of the contract of dissolution, and about the 15th of May, 1869, he and Smith and Jones, Steele and Sheriffs held a meeting at which it was agreed that all mining property acquired by Smith, while acting in Utah, should be for the benefit of said parties; that the parties should each advance the necessary funds for that purpose, but that Smith was to advance Bragg's proportion; and that pursuant to that agreement Smith went to Utah in the month of May, 1869; that in January, 1870, Smith returned to Chicago (having wasted and squandered the money previously furnished him) for more money and to consult with his copartners; that in April, 1870, he was again sent to Utah by his copartners and supplied with funds by advances made in equal proportions by the copartners; and that, upon reaching Utah, in April, 1870, Smith purchased

of Robert Bruce Chisholm and Woodman, a certain interest in the "Emma" mine for $200, which sum he paid out of the money advanced by his copartners, etc.

It is necessary to see whether this allegation is sustained by the evidence. Before referring to the evidence bearing upon the question, however, it is proper that we should determine the competency of certain evidence heard upon the trial of the cause in the superior court, to which objection was made by the counsel representing the executors and William B. Smith.

The defendants, Steele and Jones, were each examined as witnesses, and permitted to testify to facts occurring before the death of James Smith, and to declarations and admissions made by him.

The case claimed by Bragg is, these defendants were co-partners with himself, Smith and Sheriffs; and the prayer of the bill is that upon a final accounting the trustees may be decreed to transfer, deliver and pay over to Bragg and the other members of the copartnership, the respective interests that may be decreed to belong to each—so that a decree in favor of the complainant would also be a decree in favor of Steele and Jones.

Under the old chancery practice, it is true, a complainant might obtain an order, as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon an affidavit that he was a material witness and was not interested on the side of the applicant, in the matter to which it was proposed to examine him: 1 Greenleaf's Evidence, § 361. If interested, however, on the side of the applicant, in the matter to which it was proposed to examine him, his evidence could not be admitted: *Dyer* v. *Martin*, 4 Scam. 147.

Our statute permitting parties and persons interested to testify in their own behalf makes the exception that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, * * * when any adverse party sues or defends as * * * the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party suing or defending." * * *

Since the adverse parties were to defend as trustees for a legatee, and as legatee and the co-defendants are, in reality, called to testify in their own behalf as well as in behalf of the complainant, there can be no pretense for admitting their evidence under that statute, and it should not have been admitted or considered: *Brown* v. *Hurd*, 41 Ill. 121; *Alexander* v. *Crosthwaite*, 44 Id. 359.

Recurring, then, to the other evidence, Sheriffs, in his answer, in response to this allegation in the bill, denies it *in toto*. There is no evidence sufficient to overcome this answer. The evidence relied upon by Bragg to support his bill in this respect is that of Fitch, Alex. McDonald, Daniel Boone, James Chisholm, Joseph F. Hatch, Philip Wadsworth, Eugene Stickney, Samuel Pease, William Loomis and Henry Fuller. Let the evidence of these witnesses be examined separately, and it will be seen that it falls far short of sustaining this allegation.

Thomas Fitch testified that a letter was written by Smith to Bragg, relating to the purchase of an interest in a mine, which he supposed to be the Emma, on account of the copartnership. All that he says on that subject is this: "Remember one letter particularly, because we relied on it to establish our case. The purport was a brief description of a mine, answering description of the Emma. Smith stated that he had an opportunity to purchase an interest in that mine for a small sum; that he thought it would pay better than their previous investment; that he was going to look at it, and, if pleased, would purchase it."

He further says: "The mine described and the locality named tallied with the Emma, and the date answered to the date of the conveyance to Smith of his interest in the Emma."

It will be noted that this is all rather the conclusion or impression made on the mind of the witness than a statement of facts. The letter, if produced, might have created quite a different impression. He does not pretend to give the words of the letter, and he speaks only after the lapse of seven or eight years, during which he seems to have traveled, for some time, in Europe, and once or more times changed his place of business, without giving any very conclusive reason for an

accurate recollection of the contents of the letter. That he is mistaken in some respects is clear beyond dispute. He says he delivered to his professional partner, at the same time with this letter, original written articles of copartnership between the parties—that is, as we understand him, between Smith, Bragg, Steele, Jones and Sheriffs. But it is, on all hands, conceded there never was any written agreement whatever between these parties. He delivered what never existed.

Again, he says the date of the letter answered to the date of the conveyance to Smith of his interest in the "Emma." But no interest in the "Emma" was ever conveyed to Smith. He was one of the original locators, and this admits of no controversy.

The fact is, in 1869 Smith acquired an interest in what was called the "Illinois Tunnel," where he spent some time in working, and this was within six hundred feet of the "Emma" mine; and, from all the circumstances, it is much more probable that it was this to which he alluded than to the "Emma" mine.

Apart from these objections to the evidence, however, it will be observed it is totally insufficient to prove a definite copartnership between Bragg, Smith, Steele, Jones and Sheriffs, formed after the first of May, 1869. He is not made to say, in this letter, who are his partners, for whom he intends purchasing, nor what the interest either is to have. While it might, in a general way, prove that others than himself were interested, it does not necessarily show that Bragg was one of those others. Alex. McDonald, Bragg's counsel claim, says that Smith spoke, in 1869 or 1870, of being interested with Steele, Jones, Sheriffs and Bragg in the "Emma" mine.

The whole of his evidence on this subject, as shown by question and answer, is as follows:

"Q. 8. State if you had a conversation with James Smith as to his business, and as to his partners, or partnership business with Bragg, Sheriffs, Steele and Jones in the years 1869 and 1870?"

(Objected to by defendants' counsel as being incompetent and leading.)

"A. Well, *if we had any conversation*, it was nothing more than that he told me they were interested in mining

business in the Emma mine at Salt Lake. That is all, and he was very anxious I should sell out and join in theirs. I didn't know what interest they had in the Emma mine, only that they were all interested. They seemed to be his backers."

Did they have any such conversation? The witness does not state. They could not have had such a conversation in 1869, because the proof is clear beyond dispute no interest was acquired by Smith in the Emma mine, at that time.

There is nothing definite or tangible in this. How would it be possible to disprove it? All that is spoken of with certainty is that Smith was anxious that the witness should sell out and join in there—whatever that may have been—and Bragg, Steele, Jones and Sheriffs seemed to be Smith's backers. He knows of no contract between the parties, and speaks of no admission defining their several interests.

The evidence of Daniel Boone, relied upon by Bragg's counsel, is that he heard Smith say: "Well, Bragg's interest and mine are mutual."

The date of this conversation is fixed by Boone, thus:

"I have taken pains to refresh myself as to the date of the loan. The papers were made out on the 27th of April, 1869. This conversation with Bragg was probably had a week or ten days prior to that."

So, it was prior to the dissolution of the real estate copartnership between Smith and Bragg, and, by no possibility, could prove or disprove an agreement made subsequently to that time. At that time, doubtless, their interests were mutual.

R. B. Chisholm testifies that in 1869 or 1870 Smith admitted that he and Bragg were equal partners in all mining property that he and Smith might acquire in Utah. He fixes this as being while they were in the real estate business, and before Smith went to Utah. It must, therefore, have been before their dissolution, and hence, like the evidence of Boone, it can neither prove nor disprove what subsequently transpired.

Joseph F. Hatch's evidence is, that Smith did not deny the partnership when called upon for a settlement. His full statement, so far as here relevant, is this:

"Smith was sick; saw him once. Asked him if he wanted to make some arrangement to settle without a suit. He told me to see Marshall and Carter, and I went to see them. Smith did not deny the partnership to me. All I knew of the matter was what I learned after Wadsworth wrote me. Smith, when I saw him, said he had an understanding or agreement with these parties about going out there. He claimed they were interested with him in some mines, but he should fight it as to the Emma mine. Believe he told me the five were interested in the other mines and the tunnel—himself, Jones, Steele, Sheriffs and Bragg."

Again, he says: "Don't know that he told me he had partners, but got the impression." And again: "I did not have much conversation with Smith at that time; he was sick. I spoke to him about these gentlemen furnishing him money. He admitted that, but that was about all he said, and for me to go and see Marshall and Carter, his attorneys."

It is not pretended this latter conversation could have had any reference to Bragg, for he does not claim to have ever furnished any money. So far as the previous admissions of Smith are concerned, which could have reference to Bragg, they are entirely consistent with the articles of dissolution, and do not, therefore, tend to prove a subsequent agreement.

Under those articles, Bragg was interested with Smith in some mines in Utah—the "Minna and Minerva." But Smith then, as after, denied that anybody else was interested with him in the "Emma."

Philip Wadsworth says that Smith, in Bragg's office, said, "These boys furnished me the money." But it is not claimed "these boys" included Bragg. He admits that he did not furnish money.

Eugene Stickney, Bragg's counsel say, testifies, that Smith went to Utah for the partnership, of which Bragg was the business man, bought a share in the Emma mine, in 1869, and in the transaction used the pural "we" and "us."

Stickney's evidence is that he was present at a conversation between Woodman and Smith in June or July, 1869, when a proposition was made, and, as he says, accepted by Smith, by which Smith acquired an interest at that time in the "Emma" mine. Woodman directly and unequivocally de-

nies that there ever was such a conversation, and he is corroborated by W. W. Chisholm and Day, who show that there then was no such thing known as the "Emma" mine.

Bragg's counsel rely on the evidence of Samuel Pease to prove that he had an office with Bragg in 1870, and heard general conversations between Smith and the parties there; that they were jointly interested in mining enterprises. He says that in 1870 he officed with F. A. Bragg & Co., composed of F. A. Bragg and James Smith. It is evident that if he is right in his statements of the persons with whom he officed, he is mistaken in his date. No one pretends that Smith and Bragg had an office in Chicago after their dissolution, May 1, 1869.

He heard casual conversations, evidently having reference to the interests of the parties before the dissolution, but too indefinite to be of any special value, thus:

"Int. 12. What was said as to the interest of Mr. Bragg and Mr. Smith by Mr. Smith, if anything?"

"A. I don't know that anything special was said about Bragg's interest, or Mr. Smith's interest. I understood that they owned some mines together, and were in business together."

So they did, and so they were. They owned, with Jones, Steele and Sheriffs, the "Minna and Minerva" lodes, and they were in business as real estate brokers in Chicago, until their dissolution, May 1, 1869.

William Loomis says Bragg and Smith borrowed money of him for mining purposes. Understood they had equal interests. Smith had been at the mines and wanted to return.

The date of this conversation is not given. The precise questions and answers relied upon are as follows:

"Int. 19. Did he (Smith) say whether any one was interested with him in the mining investments?"

"A. Well, he and Bragg were occasionally talking together in my hearing, and they said 'we,' etc."

"Int. 20. What, if anything, did Smith tell you with regard to a joint interest?"

"A. Well, I don't know that he said anything in particular about it. Well, as I understand it, they had equal interests—him and Bragg—something to that effect. I used to sit and hear them talk, and *I paid no attention to it.*"

Obviously, no great reliance should be placed on such evidence as this. It proves nothing.

Finally, it is claimed by Bragg's counsel that Henry Fuller testified that he took, from what Smith said, that he and Bragg were partners, and that they had a good mine. This is not evidence. It is mere impression—inference. *What did Smith say?* We can not know from this. Mr. Fuller may have drawn a very improper conclusion from the language used.

Sheriffs' declarations are inadmissible to prove the allegations of the bill, even if we conceded them to be to that effect, which we do not. As a partner, we have seen, he would not be a competent witness, when called against his co-defendant, to establish the partnership, and *a fortiori*, his acts and declarations are not competent for that purpose: *Bishop* v. *Georgeson*, 60 Ill. 484; *Smith* v. *Hulett*, 65 Id. 495.

As a trustee, he could not make any admission to the prejudice of the trust fund and against the *cestui que trust: Thomas* v. *Bowman*, 29 Ill. 426; Same case again in 30 Ill. 84.

The evidence showing how Smith acquired an interest in the "Emma" mine is strongly corroborative of the denial of Sheriffs' and Geddes' answers, and is, moreover, of itself, it would seem, sufficient to repel the idea that there could be a resulting trust in the interest Smith acquired in that mine, in favor of Bragg or any one else, for there can only be a resulting trust where property is acquired and held in the name of one person, which, in equity, belongs to another; and this can not be true of property given to an individual for his own use.

It is in proof that what was subsequently called the "Emma" mine was first discovered by Woodman in August, 1869, though Woodman had been at work prospecting there sometime before, and he worked it thenceforth as the "Woodman" mine until in February, 1870, when it was located and recorded as the "Emma." He shows that Smith's interest in that mine was a gift. He says:

"On the 30th day of August, 1869, Capt. Smith went with me to the mine and examined the ore at the mouth, and seemed well pleased. Next day I let him have my horse to

go to Salt Lake on his way to Chicago. He expected to return in a month. Walking a little way with him I said: 'Smith, I am going to give you an interest in that mine, and if you can loan me some money when you return to aid me in shipping the ore, why do so.' He thanked me, and said it was more than he expected. According to my promise, I located him 200 feet in the mine in February, 1870. He returned in May, 1870, when I wrote to him, Day and Chisholm, to meet me in Salt Lake. On their arrival we formed a partnership to work the mine."

He further says the name "Emma" was never applied to the mine until February 24, 1870.

James M. Day says: "First became interested in the Emma mine about September 1, 1868, through Chisholm and Woodman, as joint locator with them. Assisted Woodman and Chisholm with money to develop the mine till August, 1869, when an ore body was found which constituted the Emma mine. About this time I met James Smith; found him prospecting different mines. About the middle of November following, met Smith in Salt Lake City; he was then arranging his business matters to go to Chicago to spend the winter. At the same time I learned from Woodman that he contemplated making Smith interested with us in the Emma mine, and to charge him nothing. It was presented to him. That information was given me by both Smith and Woodman —that Smith acquired his interest without consideration; he was given to understand what his interest was in February, 1870, when he was placed with the rest of us as locators of the mine. During the summer and fall of 1869 Smith was engaged in mining, superintending the works in the Illinois tunnel; was also working upon other locations."

Wm. Chisholm shows that in the summer of 1869 Smith worked first in the Woodhull mine, in Brigham canyon. In July he went to Little Cottonwood canyon to work on a mine called the "The Gem." He also worked the same summer on the Cincinnati and Illinois tunnel, which was about 600 feet from the shaft of the "Emma" mine. Smith first had an interest in the "Emma" mine shortly before its location in February, 1870.

The record of the location of the mine shows that it was

located February 24, 1870, and that James Smith was one of the locators.

The evidence is clearly sufficient to overcome the loose general declarations of interest relied upon and which we have examined.

As is well said by Greenleaf in his work on Evidence, § 200, "With respect to all *verbal* admissions it may be observed that they ought to be *received with great caution;* the evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say."

We see no cause to disturb the decree below, and the judgment of the appellate court will, therefore, be affirmed.

Judgment affirmed.

HANSEN v. MARTIN.

(54 California, 394. Supreme Court, 1880.)

New trial—Irrelevant testimony. The admission of irrelevant and immaterial testimony is not ground for a new trial unless the party was prejudiced by it.

Cross-examination—Imperfect transcript. It did not appear from the transcript that a question asked upon cross-examination was ever answered, nor did it appear but that the direct examination had laid a foundation for the question: *Held*, that the action of the lower court in overruling the objection to the question must be affirmed.

Appeal from a judgment for the plaintiff, and from an order denying a motion for a new trial, in the Third District Court, City and County of San Francisco.

W. H. TOMPKINS, for appellant.

WISE & MHOON, for respondent.

Department No. 2, MYRICK, J.

This was an action founded upon an alleged verbal contract relating to the purchase, for joint account, of stock of the Justice Mining Company and other companies. The case was tried by a jury. Plaintiff had judgment; defendant moved for a new trial, which was denied, and defendant appealed.

Three alleged errors are relied upon by appellant:

1st. Plaintiff, being examined on his own behalf, was asked, "How much of the Knickerbocker stock did defendant buy under your advice?" Defendant objected. The question was asked with the avowed object, not to claim anything for Knickerbocker stock, but to show the connection between the parties, and their relations and actions growing out of the contract alleged. The court overruled the objection; no exception was taken. The answer, "He bought some, he told me so," could not have prejudiced the defendant; on the contrary it might tend to show the relations of the parties, viz., that they were dealing in stocks, and it was therefore relevant.

2d. Question addressed to plaintiff: "Did you obtain employment as purser on the steamship *Salvador*, on the 22d day of August, 1874?" Defendant objected; the objection was overruled; no exception taken. The answer was given, which was matter of inducement to the alleged contract. At a subsequent period in the trial, defendant moved to strike out the testimony, which motion was denied, and defendant excepted.

Even if the testimony had been irrelevant and immaterial, its retention is not ground for granting a new trial, unless it appear that the party was prejudiced by it: *Tully* v. *Harloe*, 35 Cal. 302. But we are of opinion that the testimony was relevant for the purpose for which it was offered.

3d. The third alleged error is as to a question put to the witness Barney, on cross-examination. Defendant objected to the question; the objection was overruled, and defendant excepted. It does not appear from the transcript that the question was ever answered; neither does it appear but that the direct examination of the witness by the defendant laid a

foundation for the question. No direct examination of the witness is in the transcript.

Judgment and order affirmed.

THORNTON, P. J., and SHARPSTEIN, J., concurred.

HINKLE ET AL. v. THE SAN FRANCISCO & NORTH PACIFIC RAILROAD COMPANY.

(55 California, 627. Supreme Court, 1880.)

Proof of extra work in suit upon contract. The plaintiffs sued for work done under a contract for the construction of a tunnel, the price to be paid upon estimates of an engineer; and the complaint alleged that the engineer, by collusion, and for the purpose of defrauding plaintiffs, had omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that they did extra work upon the promise of the engineer, ratified by that of the president of the defendant corporation, that the work should be paid for at the same rate as that contracted for: *Held*, that as the plaintiffs had sued only for work done under the contract, and not for extra work, the evidence was properly excluded.

Instruction concerning matters not in record. The court instructed they jury that if the estimates of the engineer were honestly made, the were conclusive: *Held*, that as the bill of exceptions did not contain the contract under which the work was done, nor any evidence upon the points to which the instruction complained of related, the instruction could not be said to be erroneous.

Impeaching witness. A witness was asked certain questions relating to matters not involved in the suit, with a view to his impeachment: *Held*, that they were properly excluded.

Appeal from an order of the District Court of Sonoma County, granting a new trial. TEMPLE, J.

The rulings referred to in the opinion were as follows: The plaintiff moved the court to instruct the jury that if they found that there was work done in excess of the estimates of the chief engineer, they should find for the plaintiff for the value of such excess at the contract price, and the court modified the instruction by adding the following words: "provided that you find that the estimates of Zooks (the chief en-

gineer) were false and fraudulent; but if they were honestly made they are conclusive, and you must find for the defendant."

The plaintiff also moved the court to instruct the jury that, even though they should believe from the evidence that a settlement was made between the parties and receipts passed, yet if they should also find that the estimates upon which the amount was ascertained were not correct, and that plaintiffs were misled or deceived by them, and settled under the mistaken belief that the estimates were correct, then that the plaintiffs were not bound by the settlement. But the court refused to give the instruction.

On the trial—with a view to his impeachment—a witness of the defendant was asked the following questions:

"Q. Were you the engineer of the railroad company (referring to a railroad company not involved in the suit), receiving a salary from the company, and dividing the profits with the contractors at the same time?"

"Q. Did you get $3,500 as a bribe from the contractors in that case?"

The first of which was objected to as not the proper mode of impeaching a witness, and the last as irrelevant and impertinent. Both questions were excluded.

McALLISTER & BERGIN, for appellant.

FLOURNOY & MHOON, for respondents.

Ross, J.

The plaintiffs moved for a new trial in the court below, on a bill of exceptions, solely upon the ground of alleged errors in law, occurring at the trial and excepted to by them. The judge who tried the cause and passed upon the motion, thought that the first exception was "probably well taken," and therefore entered an order granting a new trial. From that order defendant brings this appeal.

No question of fact being involved, it will be our duty to reverse the order if, in our opinion, no error of law was committed in the trial already had; and this is to be determined from the record as made.

In the complaint it is alleged that on the 9th of October, 1875, the plaintiffs entered into a contract with the Sonoma and Marin Railroad Company whereby they undertook and agreed to excavate and construct a certain tunnel, within a designated time, according to certain plans and specifications, and to the satisfaction of the chief engineer of the railway company, for which the company promised to pay plaintiffs at certain rates in gold coin, and in the following manner, to wit: "The chief engineer of said Sonoma and Marin Railroad Company was, by the terms of said agreement, bound and obliged to measure and estimate, on or about the first day of each calendar month, the amount of work done during the preceding month, and to estimate and certify to the amount due for such work according to said contract, and to deliver such certificate to the president of said company; and thereafter, on the tenth day of each month, the said company was bound and obliged to pay to these plaintiffs the amount named in said certificate, less twenty per cent. thereof, which said twenty per cent. so deducted and retained, should be paid to plaintiffs on the said engineer's final estimate and certificate upon the completion of said contract."

The complaint also alleges full performance on the part of the plaintiffs of all the requirements, covenants and conditions of the contract, and the due acceptance of the work, and, further, that on the 29th of June, 1877, the said Sonoma and Marin Railroad Company merged into and was consolidated with the defendant, pursuant to law, whereby defendant "succeeded to all the rights, duties and obligations of the said Sonoma and Marin Railroad Company."

As constituting the plaintiffs' cause of action, the complaint next charges: "That for the excavations and embankments and tunneling done and made under said contract as aforesaid, the said chief engineer made his estimate of the work done and returned his certificates of the sums due thereon, less 20 per cent. thereof, from time to time, until March 9, 1877, when said engineer made his final estimate of the work done, and returned his final certificate of the sum due plaintiffs for the performance of said contract. That said engineer, in making said estimates and returning said certificates, falsely, fraudulently, and by and with the procurement of and collu-

sion with said Sonoma and Marin Railroad Company and its officers, neglected and omitted and refused to include in estimates of work done by plaintiffs under said contract, 11,922 cubic yards of excavation and embankment and also fifteen feet of tunneling, unfairly, improperly and contrary to the intent and meaning of said contract; that said plaintiffs have duly notified said engineer and the defendant of the foregoing facts, and demanded from said engineer an estimate of said 11,922 cubic yards of embankment and excavation and fifteen feet of tunnel, and a certificate of the amount due therefor, but said engineer refused and still refuses to estimate said work, or certify the amount due therefor, in collusion with and by the procurement of said defendant, and with the intent and for the purpose of defrauding these plaintiffs, to their damage in the sum of $12,963.90"; for which sum the plaintiffs ask judgment against the defendant.

It will be thus seen that the gist of the plaintiffs' action, as stated in the complaint, is the alleged fraudulent omission and refusal of the engineer to include in his estimates certain work performed by plaintiffs.

At the trial it was conceded that the plaintiffs performed all of the work provided for in the contract, and that it was duly accepted by the defendant. Counsel for plaintiffs then offered to prove by one of the plaintiffs that "during the progress of the work under the contract, he was ordered by the engineer to remove, and did remove certain earth that had caved in upon the work, and that the engineer of the road told him that he would be paid for it as he was paid for similar work under the contract; that afterward the matter was brought to the attention of Mr. Donahue, the president of the road, and that Mr. Donahue agreed to it." The offer having been objected to by the defendant, the court sustained the objection, and the plaintiffs reserved an exception. This ruling seems to have been the ground of the order granting a new trial.

In our opinion, the ruling was right, and the exception not well taken. Admitting that evidence tending to show that the estimates of the engineer were grossly erroneous was material upon the question of fraud, there was nothing in the offer tending to show that the estimates were in any respect erroneous. On the contrary, it seems to have proceeded upon

the theory that the work referred to was independent of the contract, and was performed by the plaintiffs on the statement of the engineer that it would be paid for "as similar work under the contract" was paid for; in other words, upon the theory that it was *extra work*. Indeed, in that portion of the testimony of the plaintiffs found in the bill of exceptions, each of them speaks of the work as "extra work." If it be treated as such, it is enough to say that the plaintiffs have not sued for the value of any extra work. It is, therefore, not necessary to inquire whether the president of the defendant corporation could bind it by his promise to pay.

Not only is there nothing in the "offer" already noticed tending to show that the estimates of the engineer were erroneous, or fraudulent, or false in any respect, but there is nothing in any of the evidence embodied in the bill of exceptions tending to show any one of these things. On the contrary, the bill recites that at the trial the defendant gave evidence purporting to explain the nature and extent of the work in question, "purporting to show that said work had been fully estimated by the engineer and paid for by the defendant, and the engineer so testified."

The bill of exceptions does not contain the contract under which the work was done, nor does it present any evidence upon the points to which the instructions complained of relate. Under such circumstances it can not be said that there was any error in the rulings of the court below respecting the instructions before us: *People* v. *Whitney*, 53 Cal. 421; *People* v. *Best*, 39 Cal. 691. Nor was there any error in the ruling in respect to the attempted impeachment of the witness Lewis: 1 Greenl. Ev. § 449.

The motion of the plaintiffs being based entirely on alleged errors in law, occurring at the trial, and it being incumbent on them to show error, and the record failing to disclose any we feel constrained to reverse the order granting a new trial,

Order reversed.

McKINSTRY, J., and McKEE, J., concurred.

ALEXANDER ET AL. v. CAULDWELL ET AL.

(83 New York, 480. Court of Appeals, 1881.)

Authority of agent of corporation exercised in excess of the corporate powers. The treasurer of the "New York Mutual Coal Co.," without authority from the board of directors, made the following offer to plaintiffs: "We wish to make an arrangement with you to furnish us coal at as low price as possible, delivered to any part of the city we may direct, you collecting the bills in the name of our company, and we paying you the difference due each month; also to deliver all coal from our mine as it arrives, and any balance left over to store in your yard, or in other words, your firm to act as delivery agents for our company," to which plaintiffs assented, and under the agreement delivered to divers persons coal to the value of nearly $1,000. The agreement was unknown to a majority of the directors, and was in excess of the powers granted to the company in its charter. Upon suit brought against the trustees of the company for balance due for coal, *held*, that the company was not liable for the debt.

Knowledge of charter limitations implied. Those who deal with corporations are chargeable with notice of the purposes for which they are formed.

Liability for acts of agents, ultra vires. Corporations are bound only by the acts of agents done within the scope of their authority.

[1] **Admissions by agent incompetent to bind—Admissions, how proved.** An agent who could not lawfully bind his principal by a contract, can not bind it by his admissions in the m tter of an attempt to make such a contract. Such admissions are not part of the *res gestæ*, were not competent against the company, and did not prove the fact of receipt by it. The fact should have been proved by calling the treasurer as a witness, or by the books of the company.

Appeal from the judgment of the General Term of the Supreme Court, offering a judgment for plaintiff entered as a verdict.

The opinion states the facts of the case.

WILLIAM N. NILES, for the appellants, who were defendants below.

JOHN E. PARSONS, for respondents

EARL, J.

This action was commenced by the plaintiffs, who claimed to be creditors of the New York Mutual Coal Company, a corporation formed under the laws of this State, against the

[1] *Wood Co.* v. *King*, 3 M. R. 618; *Cons. Gregory Co.* v. *Raber*, 1 M. R. 405.

defendants, trustees of the corporation, to enforce their liability to them, as such creditors, for omitting to publish and file the annual report required by section 12 of chapter 40 of the Laws of 1848, the act for the formation of manufacturing and mining companies.

The defendants defended the action on the ground that the plaintiffs had no claim against the corporation, and whether there was proof sufficient to show that they did have is the only question which it is deemed important now to consider.

It was stated in the certificate of incorporation of the coal company, that it was formed "for the purpose of working coal mines and the mining for coal in the mines situated on the DeLong Tract, so called, in the township of Blythe, Schuylkill county, State of Pennsylvania, which shall be held by said company, under leases, and the transporting to market and vending of said coal;" and in a prospectus issued by the company, the purposes and mutual character of the company were more fully disclosed. The coal was to be mined at the places indicated in the certificate of incorporation, and transported and delivered to stockholders at actual cost, each stockholder being entitled annually to one ton of coal for every share of stock held by him, the shares being at the par value of ten dollars each, and if more coal should be mined than was needed on this plan to supply the stockholders, the balance was to be sold at market rates and the profits divided among the stockholders.

It was no part of the business of the corporation to purchase coal in the market and sell it to its stockholders or to others, or to sell coal to others except in the case of surplus not needed to supply its stockholders.

The coal company was organized in the latter part of the year 1865, and in the spring or summer of 1866 it commenced its mining operations in Pennsylvania on a small scale, and it brought, so far as the case discloses, but one boat load of coal to New York, and that was distributed to its stockholders. It had a president, Mr. Browne; a treasurer, Mr. Ball; a secretary, Mr. Neal; and a general agent, Mr. Carpenter. The powers and duties of these officers, so far as appears, were not defined by by-laws or resolutions of the board of directors. Their powers, so far as we know, were such only as may be inferred from the names of their officers. The business of the

company, so far as it did any, was in the main managed by them. The company had an office in the city of New York, where the secretary and treasurer, who were not directors, were generally present, and the president and directors were also occasionally there.

On the 30th day of June, 1866, Ball, the treasurer, addressed a letter under the heading "New York Mutual Coal Co.," to the plaintiffs, who were retail coal dealers in the city of New York, in which he said: "We wish to make an arrangement with you to furnish us coal at as low price as possible, delivered to any part of the city we may direct, you collecting the bills in the name of our company, and we paying you the difference due each month; also to deliver all coal from our mine as it arrives, and any balance left over to store in your yard, or in other words, your firm to act as delivery agents for our company." This letter the plaintiffs answered on the 2d day of July, assenting substantially to the proposed arrangement.

Under this arrangement, upon orders issued by Neal and by Ball from the office of the company, the plaintiffs, between July 4th and August 10th, 1866, delivered coal to divers persons to the value of nearly $1,000, and this action is brought to recover the balance due them for this coal.

It does not appear that this coal was delivered to stockholders of the company, or upon any contracts made by the company, and it does not appear what connection, if any, it had with the business of the company. It does not appear that these transactions were known to any director of the company, or that they appeared upon any books of the company, and it affirmatively appears that they were not authorized by resolution of the board of directors, and that they were entirely unknown to a majority of the directors.

We have not here the question which would have to be considered if these transactions, outside of the legitimate business of the corporation, had been actually authorized by the board of directors. But we have the question whether the company was bound for this debt thus created by its secretary and treasurer assuming to act for it. We are of opinion that it was not.

Every one knows that corporations are artificial creations

existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed, and when he deals with agents or officers of one of them, he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority: Angell & Ames on Corp., 288, 301.

Here the plaintiffs were chargeable with knowledge that this corporation was organized for the purpose of mining coal and bringing it to New York for its stockholders or for sale. They were chargeable with notice that it was no part of the legitimate business of the corporation to go into market and buy coal for sale again to others. And it was not, upon any facts here appearing, within the scope of any apparent authority conferred upon the secretary and treasurer to purchase this coal of the plaintiffs. It can never be presumed that an agent of a corporation had authority to transact business which the corporation itself was not, by its charter, authorized to engage in.

And this purchase of coal was not ratified by the company. It does not appear that this business was so carried on at the office of the company that any of its directors would have knowledge of it, nor does it appear that it was entered in the books of the company, where they would receive notice of it. There was some evidence, by no means satisfactory, that the president of the corporation, now dead, had some knowledge of these transactions, but, even if he did have, it could make no difference, as he had no more power than the secretary or treasurer to bind the company in this illegitimate business.

We have not here the question we would have to consider if the corporation had actually had the benefit of this coal, by the receipt into its treasury of the proceeds thereof, because there was no competent evidence of such receipt. It is true that evidence was given, against the objection of the defendants, that the treasurer had admitted, at some time, that he had received payment for the coal delivered by the plaintiffs, and had used it in the business of the company. But such admissions do not appear to have been made as part of any

res gestæ, and they were not competent against the company, and did not prove the fact of receipt by it. The fact, if important, should have been proved by calling the treasurer as a witness, or by the books of the company, or in some other legitimate way. He was unauthorized to buy the coal, and he certainly could not bind the company by afterward admitting that he had received and disbursed for the company the proceeds thereof: *Soper* v. *Buffalo & Rochester Railroad Company*, 19 Barb. 310: *Niagara Falls Susp. Bridge Company* v. *Bachman*, 66 N. Y. 261; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1-29; *Allegheny County Work House and Inebriate Asylum* v. *Moore*, in the Supreme Court of Pennsylvania, October 25, 1880.

We are therefore of opinion that the plaintiffs did not establish any debt against the corporation, and hence that this recovery can not be upheld.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur, except FOLGER, Ch. J., and ANDREWS, J., not voting, and MILLER, J., absent from argument.

Judgment reversed.

1. In an action for purchase money, evidence admitted that the price was to be paid out of the proceeds: *Hoeveler* v. *Mugele*, 66 Pa. St.; *Post* VENDOR AND P.

2. Parol evidence admitted to apply, but not to explain the terms of a written instrument: *Snodgrass* v. *Ward*, 4 M. R. 306.

3. Parol evidence allowed to prove whether contract was intended to be entire or divisible: *Graver* v. *Scott*, 2 M. R. 644.

4. Parol evidence not allowed to prove quality of barytes ordered: *Fitch* v. *Archibald*, 2 M. R. 555; or to explain the meaning of "screened coal," as used in a contract: *Mercer Co.* v. *McKee*, 5 M. R 531.

5. Parol admission of the existence of a corporation will not supply lack of proof that the statutory requirements have been complied with: *Indianapolis Furnace Co.* v. *Herkimer*, 46 Ind. 142.

6. Evidence of custom admitted, that in contracts relating to sales of mining shares delivery takes place at time of payment: *Field* v. *Lelean*, 6 H. & N. 617; *Winans* v. *Hassey*, 2 M. R. 284.

7. Parol evidence to show that the *next dividend* was excluded in the assignment of stock: *Brewster* v. *Lathrop*, 2 M. R. 552.

8. Admissions of partners and agents are not binding beyond the scope of their business relations to their principal: *Jones* v. *O'Farrel*, 1 Nev. 354.

9. Declarations of agent no evidence of the reasons of his principal for ceasing to operate oil well: *Karns* v. *Tanner*, 66 Pa. St. 297.

10. "Copy" of location notice is admissible evidence: *McKinney* v. *Smith*, 1 M. R. 65^.

11. Book of district rules is evidence: *Orr* v. *Haskell*, 4 M. R. 492; *Roach* v. *Gray*, 4 M. R. 450.

12. Lost district records, how proved: *Belk* v. *Meagher*, 1 M. R. 510, 522.

13. Entries made from wagoner's daily returns of loads of coal hauled are original entries: *Jones* v. *Long*, 3 Wa'ts, 325.

14. Distinction between book entries and memoranda: *Goodspeed* v. *Wasatch Works*, 2 Utah, 263; *Post* PARTIES.

15. Entries on stock book (if admissible at all to prove a party a stockholder) may be rebutted: *Mudgett* v. *Horrell*, 33 Cal. 25.

16. Minutes of corporation meeting may be contradicted by parol testimony: *Gilson Co.* v. *Gilson*, 51 Cal. 341.

17. The value of a mine is matter of opinion: *Gifford* v. *Carvill*, 29 Cal. 589; *Post* FRAUD.

18. Proof that the mine of a company is of no value does not prove its corporate stock to be worthless: *Gifford* v. *Carvill*, 29 Cal. 589; *Post* FRAUD.

19. Evidence of condition of shaft, in January, no evidence of its condition in the previous November: *Eureka Co.* v. *Braidwood*, 4 M. R. 148.

20. Incidental matters allowed to prove the fact of possession: *English* v. *Johnson*, 17 Cal. 108; *Post* POSSESSION; *Pennsylvania Co.* v. *Owens*, 15 Cal. 135; *Post* POSSESSION.

21. Scope of examination allowed in action for filling stream with tailings: *Bell* v. *Shultz*, 18 Cal. 450; *Post* TAILINGS.

22. Matters going to the credibility of a witness can not possibly all appear of record; for this reason courts will not reverse for mere apparent preponderance of testimony: *Illinois Co.* v. *Ogle*, 92 Ill. 353; *Post* MEAS. DAMAGES.

23. Evidence of experts criticised: *Abinger* v. *Ashton*, 6 M. R. 1.

24. Testimony of experts in cases of eminent domain: *Brown* v. *Corey*, 5 M. R. 368.

WHITAKER v. BROWN.

(46 Pennsylvania State, 197. Supreme Court, 1863.)

Reservation construed as an exception. Words of reservation in a deed may operate by way of exception, and have effect when the subject of the reservation is a thing corporate and *in esse* when the grant is made, and not something created, as a rent or other incorporeal interest.

[1] **Reservation of coal in deed.** Where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," it was *held*, that the saving clause operated as an exception of the coal, and, therefore, that the entire and perpetual property therein remained in the grantor.

Error to the District Court of Allegheny County.

This was an action of trespass *vi et armis*, by Anthony Whitaker, against William H. Brown, to recover damages for breaking and entering the plaintiff's close, and for digging, mining and carrying away thirty-nine thousand six hundred and twenty-five bushels of bituminous coal, and converting and disposing of the same to his own use.

After the plaintiff had offered all his evidence the defendant's counsel moved the court to enter a peremptory nonsuit under the act of assembly, which was done, and this was the error assigned here.

The facts of the case are sufficiently stated in the opinion of this court.

B. F. LUCAS and JOHN L. CASE, for plaintiff in error.

H. BERGWIN, for defendant.

SAMUEL A. and W. L. PURVIANCE, for the heirs of Boyle Irwin, deceased, under whom the defendant claimed.

WOODWARD, J., delivered the opinion of the court.

On the 14th of March, 1853, Boyle Irwin and wife conveyed, by warranty deed, six and a half acres of land in Allegheny County, to Anthony Whitaker in fee, "he, the said

[1] *Marvin v. Brewster Co.*, 55 N. Y. 538; *Post* RESERVATION.

Boyle Irwin, saving and reserving nevertheless for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon-road to haul the coal therefrom as wanted." Boyle Irwin is dead, and his rights in the coal, if descendible, are vested in his heirs, under whom the defendant justifies his entry to take coal.

It is argued that the above clause of the deed constituted a strict and technical reservation, which, having no words of perpetuity, died with Irwin, and, therefore, that Whitaker now has a several and exclusive title to all the coal in the land conveyed to him. On the other hand, the argument is, that it was not a reservation, but an exception, and, therefore, that no title to the coal passed to Whitaker by the deed. The question is, whether the words of the deed constituted a reservation or an exception.

Although they were apt words to constitute a reservation, yet so far as they affect the coal, they must operate as an exception, because the coal was a corporeal hereditament, *in esse* at the date of the deed, part of the land itself, and therefore not the subject of a reservation. Says Lord Coke, "note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) and a reservation, which is always of a thing not *in esse*, but newly created, or reserved out of the land or tenement demised." And his criticism upon the word reserve is as follows: "Reserve cometh of the Latin word *reservo;* that is, to provide for store, as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. *And sometimes it hath the force of saving or excepting.*" 2 Thomas' Coke Litt., star page 412. And so in Sheppard's Touchstone we read that "a reservation is a clause of a deed whereby the feoffer, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenor of that which was before. If we grant land yielding for rent money, corn, a horse, spurs, a rose, or any such thing, this is a good reser-

vation; but if the reservation be of the grass, or of the vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void:" Touchstone, p. 80, *et seq.* Void I take it the meaning is, as *reservations*, but capable of support as exceptions. In the case of *The Earl of Cardigan* v. *Armitage*, 2 B. and C. 197, the words of the deed were "except and always reserved," and they were applied, among other things, to all the coals in the land granted, together with right of way to take them. BAYLE, J., treated this as an exception of the coals, which were part of the thing granted, part of the land, an *in esse* at the time, and because they were never out of the grantor would have remained to him and his heirs, even without the word heirs, which happened in that instance to be added. In respect to the right of way, he quoted the rule from the Touchstone, that when anything is excepted, all things that are depending on it and necessary for obtaining it are excepted also.

This case is very much in point—indeed it is a direct authority for the ruling below, and it has been recognized and followed in subsequent cases: *Fancy* v. *Scott*, 2 Man. & Ryl., 335; *Douglas* v. *Lock*, 4 Nev. & Man. 826.

In our own case of *Shoenberger* v. *Lyon*, 7 W. & S. 184, the words "excepting and reserving," were construed an exception, but were set aside on the principle that every saving in a deed as large as the grant is void.

Thus it appears, upon sufficient authority, that words of reservation may operate by way of exception, and to have any effect, must do so when the subject of the reservation is not something newly created, as a rent or other interest strictly incorporeal, but is a thing corporate and *in esse* when the grant is made. That the coal in question was land is not to be doubted, since the case of *Caldwell* v. *Fulton*, 7 Casey, 475. As such, it would have passed under Irwin's deed to Whitaker, had it not been excepted out of the grant. At the date of the deed, Irwin held it in fee simple, and because it did not pass by the conveyance, he continued to hold it in fee. The word heirs was not necessary in the reservation, for an estate of inheritance existed already in Irwin, and, unimpaired by the conveyance, it descended to his heirs at his death. And so also the right of way expressly annexed to the

estate in the coal was saved by the exception, and descended to his heirs. The law would have given it if the parties had not expressly reserved it.

But what was the extent of the coal reservation? It is an undoubted rule that an exception in a deed is to be construed most strongly against the grantor, and most favorably to the grantee. And upon this principle it is claimed that it was only a special and temporary use of the coal that was reserved to Irwin himself, a right to use the coal during his life, but which ceased at his death. We can not so read the clause. "The coal contained in said piece or parcel of land" was the subject of the reservation. If that means less than the whole how much less? What proportion of the coal was reserved? Words not larger than these were construed to mean the whole of a coal right in *Caldwell* v. *Fulton*, and we confess we should not know by what rule to restrict these words if we felt called upon to impose a restriction where the parties imposed none? Do the words "for his own use" amount to a restriction? Sometimes the use is limited in point of duration; as while the grantee is tenant of a particular messuage or so long as he manufactures a specific production; but here it is as general and absolute as so few words could make it. "For his own use," means in such a reservation, the same dominion and proprietorship over the coal that he would have had if he had made no deed for the land. He held it for his own use in all the forms that it was capable of being used at the date of his deed—he held it just as absolutely after his deed was delivered.

The judgment is affirmed.

SLOAN ET AL. v. THE LAWRENCE FURNACE CO.

(29 Ohio State, 568. Supreme Court, 1876.)

[1] **"Reserving" construed as "excepting."** The words "reserving all the minerals underlying the soil" evidently intend an exception of the minerals, and the deed should be construed accordingly notwithstanding the technical distinction between a reservation and an exception.

[1] "Exception" and "Reservation" distinguished. *Ryckman* v. *Gillis*, 57 N. Y. 68; *Fancy* v. *Scott*, 2 Man. & Ry. 335; *Hudson Co.* v. *Stockbridge Co.*, 107 Mass. 290.

Motion for leave to file a petition in error to the District Court of Lawrence County.

The original action was brought by the defendant in error against "The Iron and Steel Co.," to recover a royalty of fifty cents per ton on iron ore mined by the defendant on certain lands named. The plaintiff in that suit claimed to be the owner of the ore in place, and entitled to the royalty. The Iron and Steel Company admitted its indebtedness on account of the royalty; but upon a showing that the plaintiffs in error also claimed to be the owners of the ore and entitled to the money, they were allowed to interplead in the action. The ores in dispute were mined on a certain tract of land formerly owned by W. P. Israel, who granted and conveyed the same to John Sloan by apt words of description: "Reserving a right of way for a road through said lands thirty feet wide to the county road, and also all the minerals underlying the soil to be mined and excavated from the front on the Ohio river." The plaintiffs in error had succeeded to the title thus conveyed to Sloan.

Afterward, on the first of August, 1867, Israel conveyed to John Peters the minerals reserved in the deed to Sloan. The defendant in error has succeeded to the title thus conveyed to Peters.

The court of common pleas rendered judgment in favor of defendant in error. This judgment was affirmed by the district court.

DEAN & FORGEY, for the motion.

NEAL & CHERRINGTON, *contra.*

BY THE COURT:

In the deed of conveyance from Israel to Sloan, the minerals underlying the soil were excepted from the grant. It is true the intention of the grantor was expressed by the word "reserving," which technically saves only a right to some use or benefit in the thing granted, instead of excluding or excepting, from the operation of the deed, a part of the thing embraced in the general description. But while this technical distinction between a reservation and an exception may exist, it is quite clear, from the subject-matter,

that "reserving" was here used in the sense of "excepting." The "minerals underlying the soil" being a part of the land described in the deed, and not a mere future benefit or interest therein, there can be no doubt the grantor intended to retain the fee-simple title to the minerals.

The defendant in error having succeeded to the interest retained by Israel, and the plaintiffs to that which was conveyed to Sloan, we think the judgment below was right: 30 Verm. 242; 46 Penn. St. 187; 3 Wash. on Real Prop., side p. 640.

Motion overruled.

1. Reservation, to a stranger, construed as an exception out of the grant: *West Point Co.* v. *Reymert*, 45 N. Y. 703; *Post* INJUNCTION.

2. Whatever is essential to its enjoyment goes with the exception: *French* v. *Carhart*, 1 N. Y. 96.

3. The exception of "mines and minerals" construed not to include open quarries: *Brown* v. *Chadwick*, 7 Irish C. L. 101.

4. Parol exception of stones on land conveyed: *Noble* v. *Sylvester*, 42 Vt. 146; *Post* PERSONAL PROPERTY.

5. An exception in a Crown grant of "all gold and silver and other mines and minerals," extends to all carbonaceous minerals: *Gesner* v. *Cairns*, 2 Allen (N. B.), 595.

6. Asphaltum is included in an exception in certain royal grants, of "all coals, and also all gold, silver, and other mines and minerals": *Gesner* v. *Gas Co.*, 1 James (Nova Scotia), 72.

See RESERVATION.

WATTS v. TIBBALS.

(6 Pennsylvania State, 447. Supreme Court, 1847.)

Levy on stone before measurement. A purchased from B the right to quarry and remove stone for the purpose of constructing certain locks, the quantity to be estimated *in the locks* and paid for at a certain rate per perch when the canal contractors should be paid. *Held*, that A had a property in the stone quarried by him for the purpose of delivery under his agreement with the canal contractors, which could be levied on and sold by the sheriff.

In error from the Common Pleas of Erie County.

Sept. 27. Trespass. Vansise made a written agreement with Sanford, by which he was to be permitted to raise and remove stone from Sanford's quarry for two locks in the canal; "say one thousand perches, the exact quantity to be ascertained by measurement in the locks;" the price being forty cents per perch, payable as soon as the contractors were paid.

Vansise having got out a quantity of the stone, it was levied upon while in the quarry, under an execution against him, and sold to Tibbals and Clark.

The defendants, Watts and others, claiming under the canal company, which had paid Sanford for the stone, having taken it away four years after the sale to plaintiffs, this action was brought by Tibbals and Clark; and the only question in this court was, whether the ruling of the learned judge was correct as to Vansise having such a property as could be sold under an execution.

His Honor (CHURCH, P. J.) instructed the jury that if the stone was got out for the use of the locks, Vansise had a property in them for the purpose of delivering under his contract for the canal, and that such right might be sold.

RABBITT & SILL, for plaintiff in error; the property remained in Sanford—at all events he had the possession, which he could retain until paid: *McDonald* v. *Hewett*, 15 John. 349; *Pritchett* v. *Jones*, 4 Rawle, 260; *Scott* v. *Wells*, 6 Watts & Serg. 357; *Srodes* v. *Caven*, 3 Watts, 258. The

right of Vansise, whatever it was, was forfeited by his laches, and the canal company might well purchase them from Sanford.

WALKER & GALBRAITH, *contra;* the stone became the property of Vansise as soon as quarried, since the vendor agreed to wait until a future time for payment. Having thus vested, the title might well be sold under an execution.

Oct. 8. BURNSIDE, J.

The only question raised on this record is, whether Tibbals and Clark acquired a right to the stone in question by virtue of the constable's sale. Sanford owned the quarry on the bank of Lake Erie, and contracted with Vansise as follows:

"Agreement, made 1st October, 1840, between Giles Sanford and David Vansise. Said Sanford permits said Vansise & Co., and they agree, to dig, raise and remove from said Sanford's quarry on the bank of Lake Erie (the same quarry formerly worked by Sherwood), stone for the two outlet locks on the Pennsylvania canal, say one thousand perch, the exact quantity to be ascertained by measurement in the locks. Said Vansise agrees to pay said Sanford forty cents per perch as the sto ıe are quarried, at least as soon and as often as payments are made to the contractors on the canal.

"Signed, GILES SANFORD.
DAVID VANSISE."

The stone in question was quarried, and at the mouth of the quarry, when the State abandoned the Erie Extension. They were levied on and sold to the plaintiffs below, on a judgment and execution against Vansise, and purchased by the plaintiffs in the execution. The substance of the second and third points is, that this sale vested no right or title in the purchasers. The court answered that the contract contained mutual covenants. That Vansise's permit was for locks 70 and 71, and Sanford was to be paid as often as payments were made to the contractors on the canal. The permission was to quarry and remove. After a careful examination of the answer of the court to these points, we think the plaintiffs in error have no ground to complain. The quantity was to be ascertained by measurement in the locks, and paid

for as the contractors received payment from the State. Vansise had a right to remove the stone. Sanford was to be paid when the stone was measured in the locks. By this written agreement Sanford trusted to the personal responsibility of Vansise. A perch of stone on the beach of the lake, where they were thrown from the quarry, would seem from the evidence to be worth between two and three dollars. The charge on this point was more favorable to the defendant than the evidence warranted.

Judgment affirmed.

CAHILL v. BENNETT ET AL.

(26 Wisconsin, 577. Supreme Court, 1870.)

Ore buyer holding proceeds for special use—Garnishment. The old firm of B., G. & Co. advanced money to Y., a miner, with a distinct understanding that the next mineral which he should deliver to them should be applied in payment of such advance. The old firm was afterward dissolved and a new one formed of the same name; and B., who was a member of both firms, and was authorized to settle the business of the old one, bought mineral for the new firm from Y., and took possession of the same with the arrangement that the money due for the same was to be applied on the claim of the old firm against Y. *Held*, that on these facts the new firm were not liable as garnishees in a suit against Y.

Appeal from the Circuit Court for Iowa County.

The plaintiff, having recovered a judgment against one Boddilly, garnisheed Joseph Bennett, Joseph George, C. C. Cholvin and Samuel Hoskins, partners, doing business under the name of Bennett, George & Co., alleging that they were indebted to Boddilly for mineral or lead ore sold and delivered by him to them. The answer of the garnishees is sufficiently stated in the opinion. On the trial of the issue raised by this answer, the circuit court rendered judgment for the defendants, and plaintiff appealed.

REESE & MULKS and GREGORY & PINNEY, for appellant, argued, that if Boddilly had demanded payment at the date

of the garnishment, defendants could not have claimed that they did not owe him, but they would have been liable to him in an action for the price of the mineral: *Huntley* v. *Stone*, 4 Wis. 91; and the plaintiff, by his process of garnishment, could avail himself of all Boddilly's rights existing on that day.

ALEXANDER WILSON, for respondents.

COLE, J.

The garnishees answered through one of the members of the firm, in substance, that in the spring of 1868, the old firm of Bennett, George & Co. advanced about $230 upon mineral to be thereafter delivered by Boddilly. It was the understanding between the firm and Boddilly, that the next mineral they bought of him should be applied upon his indebtedness to them. The old firm was dissolved in January, 1869, and two of the members of that firm, with two other partners, organized the new firm in April, under the same firm name as the old. When the old firm was dissolved, it was agreed that Bennett, a member both of the old and of the new firm, should collect the debts of the old firm, and distribute the proceeds among the members *pro rata*. On the 23d of May, 1869, the new firm, through its member, Bennett, bought of Boddilly $230 of mineral, with the understanding that this money was to be applied in the payment of Boddilly's debt to the old firm. Bennett, who answers for the garnishees, says that this understanding was had with Boddilly in May, 1868, and that at the time the last mineral was delivered no new understanding was had with him concerning the application of the proceeds of the mineral.

It seems to us there can not be any doubt about the right of Bennett to make the application of the money arising from this mineral to the payment of the debt due the old firm. This was in accordance with the understanding had with the debtor that it should be so applied. It is true, the price of the mineral was not agreed upon before the service of the garnishee process. But the property in the mineral had passed out of Boddilly, and he had virtually made appli-

cation of the proceeds. Bennett had authority to act for both firms, to receive the mineral for the new firm and likewise the moneys arising therefrom for the old. And as there was a clear and distinct understanding with Boddilly that this mineral should be applied to discharge the debt due the old firm; that agreement and understanding should have effect.

We therefore think the court properly refused to give judgment in favor of the plaintiff against the garnishees.

BY THE COURT: *The order of the circuit court is affirmed.*

WARD AND OTHERS' APPEAL.

(81½ Pennsylvania State, 270. Supreme Court, 1875.)

Sale of partnership property for individual debts. A levy and sale of partnership property under an execution for the individual debt of one of the partners, passes his interest only; this can be determined only by an account of the partnership affairs.

Preference to laborers—Local statute. King and Morrow carried on mining; execution was issued against King for his individual debt, and his interest in the partnership sold by the sheriff: *Held*, that under the act of April 9, 1872 (Preferences to Laborers), the laborers for the firm had no claim on the proceeds of the sale, which only represented the interest of King incumbered with the joint debts.

Appeal from the Court of Common Pleas of Armstrong County.

On the 5th of August, 1874, Samuel C. King and Jacob V. Painter, by virtue of a warrant of attorney, entered judgment in the Court of Common Pleas of Armstrong county, against Samuel M. King, for $370.87. On this judgment a *testatum fi. fa.* was issued to Butler county. King, the defendant, was a partner with Samuel Morrow, under the firm name of King & Morrow, in a coal lease in Butler county. The debt for which the judgment was entered was King's individual debt. The sheriff of Butler county under the *testatum*, sold the interest of King, and paid into court, in Armstrong county, $273.50.

Jeff. Reynolds, Esq., was appointed auditor, to report distribution. The claimants before him were M. V. B. Ward and others, laborers at the coal mines for the firm of King & Morrow and the execution creditors. He reported awarding the fund to the laborers under the act of April 9, 1872, Pamph. L. 47, section 1, 2 Br. Purdon, 1,464, pl. 1, providing preferences for laborers about mines, etc.

On exceptions the court of common pleas reversed the report. Boggs, P. J., delivering the opinion as follows:

" * * King and Painter claim the proceeds of sale on their execution upon which the sale was made; and certain labor creditors of the firm of King & Morrow, on notice of their claims to the sheriff, also claim the funds. The question is, which of the parties claiming the funds are entitled to receive them? If there is any point of law settled in Pennsylvania, it is that in case of partnership the joint effects belong to the firm and not to the parties, each of whom is entitled only to a share of what may remain after the payment of the partnership debts; and no greater interest could be derived by a voluntary assignment of his share, or by sale of it on execution. A separate execution creditor sells, not the chattels of the partnership, but the interest of the partner incumbered with the joint debts; and the joint creditors have therefore no claim to the proceeds in such case. The proceeds of the sale represent the individual interest of the partner sold, and not that of the partnership, and must be appropriated accordingly. This doctrine is ruled in the case of *Doner* v. *Stauffer*, 1 Penna. Reports, 198, and a long line of cases following establish it to be the rule of law: *Vandike's Appeal*, 7 P. F. Smith, 12; *Deal* v. *Bogue*, 8 Harris, 228; *Baker's Appeal*, 9 Id. 76; *Cooper's Appeal*, 2 Casey, 262; *McCormick's Appeal*, 7 P. F. Smith, 54; *Vandike* v. *Rosskam*, 17 Id. 334; *Whigham's Appeal*, 13 Id. 199; *Meily* v. *Wood*, 21 Id. 488. The execution creditor can sell upon a *fi. fa.* all the right, title, interest, and claim of the individual defendant in the partnership, and the sheriff's vendee can institute either an action of account, render or file a bill in equity, to obtain what he may be entitled to receive, if anything, as purchaser at sheriff's sale: *Vandike* v. *Rosskam*, 17 P. F. Smith, 334; *Knerr* v. *Hoffman*, 15 Id.

129. In the light of these authorities, it is manifest that the auditor erred in appropriating the funds to the labor claims. * * * The auditor's distribution is therefore set aside, and the proceeds of sale, after the costs of audit, are given to the execution creditors, S. C. King and J. V. Painter."

Ward and the other laborers appealed from the decree, assigning for error that the court reversed the report of the auditor, and awarded the fund into court to the execution creditors.

J. SMULLIN and E. S. GOLDEN, for appellants.

The act of 1872 was intended to give the laborer a preference over *all* creditors in *all* cases of execution, etc., and gives a lien "to the extent of the *interest* of said owners," for the reason that not only is the partnership liable, but the individual partner in his separate estate. The other partner's interest might be sold on a separate execution, and thus the entire title of the firm would pass to the purchaser: *Kelly's Appeal*, 4 Harris, 59; and the laborers preference under the act would be an imaginary thing.

J. GILPIN, for appellees.

The act of 1872 is against common right, and must be strictly construed. A partner's interest in the firm property is an incorporeal, intangible thing, a right to an account and to a share after all the debts are paid: *Whigham's Appeal*, 13 P. F. Smith, 199. There can be no lien upon what is intangible. The purchasers at sheriff's sale got no part of the firm property. If the laborers are allowed to take their claims from King's interest, these execution creditors, being his individual creditors, would get nothing; while Morrow's individual creditors, afterward selling his interest, would get their money, the labor liens having been paid from King's interest.

Judgment was entered in the Supreme Court, November 4, 1875.

PER CURIAM.

It is a well settled principle of the law of partnership that a levy and sale of partnership property, under an execution

for an individual debt of one of the partners, pass only the interest of that partner in the partnership effects; and that can be determined only by an account of the partnership affairs, exhibiting the resulting interest of that partner. There being no conversion of the partnership title in the property, the laborer's lien does not attach to the proceeds of the sale, but must remain upon the partnership property until it is converted by such a sale as will entitle them to come in upon the proceeds as partnership effects.

Decree and order of the court affirmed, at the cost of the appellants, and the appeal dismissed.

Affirmed.

1. Mining stock seized upon the person (under Nevada practice): *Bivins* v. *Harris*, 8 Nev. 153.

2. Writ levied by mining for gold (under California practice): *Rowe* v. *Bradley*, 12 Cal. 227; *Post* TRESPASS.

3. Practice in levying upon leasehold interest: *Titusville Works App.*, 77 Pa. St. 103; *Post* LEASE.

4. Personal goods in a mine can not be considered levied on and sold by a sale on surface without seizure, sight, or reduction to possession: *Carey* v. *Bright*, 58 Pa. St. 70.

5. Party claiming himself wrongfully ousted by writ of restitution must make out a strict case: *California Co.* v. *Redington*, 50 Cal. 160.

GRAVES, Administrator, v. POAGE.

(17 Missouri, 91. Supreme Court, 1852.)

[1] **Kindness to the dead can not make a party liable as executor de son tort.** Two citizens of Missouri were mining for gold in a wild, unsettled portion of California, living in the same tent, and working together. One of them died. The other sold the wearing apparel and took charge of deceased's share of the gold. Out of it he paid the burial expenses and started home, to Missouri, with the balance. On the way he was robbed of the gold. *Held*, that these were mere acts of kindness and Christian charity, and did not render defendant liable as an executor *de son tort*.

Idem—Gratuitous bailee liable for negligence. His only responsibility was for such care in transporting the property as a bailee without hire, to wit, for gross negligence, which was not proved.

The opinion states the facts.

GAMBLE, J., delivered the opinion of the court.

Graves, the intestate, and Poage, the defendant, together with the brother of Poage, were at work in California, digging for gold in a common adventure, and sharing their gains. They lived together in a tent, in a wild, unsettled part of that country. They were all citizens of Monroe county in this State, and had not changed their domicile. Graves became sick, and received all the attention which the condition of the Poages admitted, and when he died he was interred by them. A physician had been procured to visit him. Upon his death he left in the tent occupied by himself and his associates, gold to the amount or value of thirteen or fourteen hundred dollars, some wearing apparel and other small articles. The two Poages, upon the death of Graves, determined to return to Missouri, and the defendant sold the wearing apparel and other personalty of Graves, which was supposed not to be worth the trouble and expense of transportation, and taking the gold of Graves to a place called Georgetown, he caused it to be weighed and the value ascertained, and a memorandum thereof to be made by persons who were acquaintances of Graves and residents of the same county in this State. Upon a consultation with those acquaintances of Graves, it was thought best that the defendant should bring the gold home

[1] *Michener* v. *Dale*, 23 Pa. St. 60.

to the family of Graves in Missouri, and accordingly, after paying the expenses of his sickness and interment, the defendant started home with the gold put into a hand trunk, in which was carried the gold belonging to himself and his brother, and that belonging to some other persons who traveled in the same company, as well as gold he was bringing home to other persons here. The evidence shows the care taken of the trunk and its contents, and the manner in which the different parcels were distinguished from each other by being in different bags. At New Orleans, the state room on the steamboat on which the defendant and his companions had taken their passage, was entered, the trunk broken open, and the gold of Graves was stolen.

The present action is brought by his administrator to recover the value of the gold and other property left by Graves at his death, upon the ground that the defendant had "kept or wasted, or disposed of the same, or had converted it to his own use." The defendant's answer admits the fact that Graves died leaving in his tent the gold and other property, and that the defendant had attempted to bring it home for the benefit of his family here, and states the fact of the robbery by which it was lost. A precise statement of the allegations in the pleadings, or of the evidence given, is not necessary to the understanding of the questions of law involved in the case. The court, at the instance of the plaintiff, gave the following instructions to the jury:

3. That in this case the defendant is bound in law to prove to the satisfaction of the jury that, in the transportation and carrying of the money, gold, etc., of the plaintiff's intestate, from California to Missouri, he used due and proper diligence in preventing the loss of the same.

4. That the question of diligence is a relative question, and the amount to be observed by a carrier in the preservation of property intrusted to his care, depends upon the circumstances of danger which surround him. A carrier is always bound to use every exertion in his power to preserve the property intrusted to his care, and any omission on his part to use all ordinary, proper and due precaution to preserve the same, renders him liable to the extent of the loss that may occur.

5. If the jury believe from the evidence, that the money

gold dust, gold and other property which defendant took into his possession, belonging to John Graves, deceased, after his death in California, was lost by defendant from want of proper and due diligence on the part of defendant to preserve and safely transport the same to Missouri, then he is liable for the amount of the same, and they should find for the plaintiff the amount they believe defendant received.

8. If the defendant took possession of money, gold and gold dust of John Graves, deceased, which was in California, at or after the death of said Graves, and removed the same from California after said death, without the order of a court having jurisdiction in the matter, and lost the same in New Orleans on his return to Missouri, by ordinary neglect, he is responsible to the plaintiff, as administrator of said Graves, for the sum so lost.

The plaintiff asked the following instructions which were refused.

1. If the jury believe from the evidence, that John Graves, the plaintiff's intestate, died in California about the 22d day of February, 1850, having in his possession at the time of his death, a large amount of money, gold dust, gold and other property, and that the same was taken possession of by defendant, after the death of said John Graves, without lawful authority, and that defendant afterward paid to Henry Cox the sum of one hundred dollars, or any other sum, out of the assets of said decedent for services rendered by said Cox to said decedent in his life-time as a physician, he, the said defendant, thereby became responsible for the amount so taken possession of by him, except the amount so paid by him to said Cox, and they should find for the plaintiff the value of the amount they believe from the evidence he received: provided they further believe that the plaintiff, after the granting of letters of administration, and before the trying of this suit, demanded the same from defendant and he refused to pay over or deliver to plaintiff the same.

2. If the jury believe from the evidence, that the defendant took possession of the effects of John Graves, deceased, in California, for the purpose of bringing them to Missouri, and that afterward the plaintiff, being the administrator of said deceased, demanded the said effects of said defendant,

and that he refused to pay over or deliver up the same, they must find for the plaintiff, unless they further find that in the transportation of the same the defendant lost them by inevitable accident.

6. If the jury find from the evidence that said John Graves, deceased, died about the 22d day of February, 1850, having in his possession a large amount of money, gold, gold dust and other property, and that after his death defendant took possession of said money, gold, gold dust and other property, or any part thereof, in California, and brought the same out of California, and on his trip to Missouri, lost the same by larceny or robbery, he thereby became liable to the administrator of Graves for the same.

7. The defendant had no lawful right to remove the money, gold and gold dust of John Graves, deceased, out of California after the death of Graves, and if defendant so removed the same out of California and lost the same in New Orleans on his return to Missouri, such loss does not excuse defendant from liability for the same, and the jury should find for the plaintiff, if they find from the evidence that, after letters of administration were granted to him on the estate of said deceased and before the institution of this suit, he demanded the said money, gold and gold dust of the defendant, and defendant refused or neglected to pay or deliver the same to plaintiff.

The court, at the request of the defendant, gave the following instructions:

1. If the jury shall find from the evidence in this case, that the defendant and Graves were mining together in a wild, unsettled portion of California, and that said Graves and said defendant and his brother were living together in a tent, and that said Graves died and left gold dust in said tent only occupied by said Graves, said defendant and his brother, and that, after the death of said Graves, said defendant and his brother left said tent to return to Missouri, their place of residence, and that of said Graves, it was proper and right for them, in the state of affairs existing in said country, to bring said gold dust to Missouri and deliver it up to the administrator of said deceased.

2. That it was proper and lawful for the defendant to bury the deceased, to defray the necessary expenses of his last

sickness, and to pay the physician's bill for said last sickness, and that such acts did not constitute him an executor *de son tort*, or make him responsible.

3. That the jury should decide from all the evidence, whether the defendant, in bringing said gold dust to Missouri, exercised ordinary care and diligence, under all the circumstances, and if they find that he did so, and that he was robbed, or said money stolen from him, they should find for the defendant.

The jury found a verdict for the defendant, upon which the court rendered judgment, and the plaintiff appealed.

The plaintiff, in the instructions refused by the court, relies upon the supposed illegality of the defendant's act in intermeddling with the property of Graves in California, and attempting to bring it home, as making him responsible for the value of the property, notwithstanding the subsequent robbery; and, secondly, that if the property was lost while in course of transportation to Missouri, the defendant is responsible, unless the loss happened by inevitable accident. The instructions given by the court admitted the liability of the defendant, if he had failed to use reasonable care in the transportation of the gold. The liability of the defendant is claimed in the petition to have arisen from the fact, that the defendant "took the property into his possession without any authority whatever, and has kept or wasted or disposed of the same, or converted it to his own use."

1. The defendant, when his companion died, leaving gold and a few articles of wearing apparel and some tools in a tent in the unsettled mining portion of California, took possession of the property, not claiming it as his own, and not seeking any advantage to himself from it. There is no concealment of the fact that he has the possession, for he takes it to where the acquaintances of Graves are to be found in California, and who were from the same county in Missouri, and he informs them that it belongs to the deceased, and has it weighed by them, and a memorandum of the fact made. It is impossible that any person can believe that it was the defendant's duty to leave the gold and other effects upon the ground, or in the tent where Graves died, exposed to every marauder who might pass by. The Israelites were taught better law, when

they were commanded in this language: "Thou shalt not see thy brother's ox or his sheep go astray, and hide thyself from them; thou shalt in any case bring them to thy brother. And if thy brother be not nigh unto thee, or if thou know him not, then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again. In like manner shalt thou do with his ass, and so shalt thou do with his raiment, and with all lost things of thy brother."

The common law, while it makes a man an executor *de son tort* by slight intermeddling with the goods of a deceased person, when the acts are of a character that can only be properly done by an executor, yet it does not impose the hazard of such executorship upon a man who merely discharges the duties of kindness and charity, "such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the effects of the deceased, making an inventory of his property, feeding his cattle, repairing his houses, or providing necessaries for his children;" 1 Williams on Executors, 214. The instances of exemption here given are but examples, and from them we can see the application of the principle to a case like the present. Although some of the acts of the defendant, such as selling the wearing apparel of the deceased, would give him the character of executor *de son tort*, if done in a regularly organized community, living under the common law, yet in the circumstances in which the defendant was placed, in a part of California where there was no civil organization, the act was one of kindness, exposing the defendant to no hazard in the law.

It is apparent, in the whole case, that the defendant was endeavoring to bring the effects of the deceased to be administered and disposed of according to the law of Missouri, the place of his domicile, and whatever might be the right of an administrator in California, if there had been one, to complain of the defendant for attempting to remove the effects, the administrator here, under the circumstances of this case, can not hold the defendant responsible for the mere act of removal.

2. The charge in the petition that the defendant kept,

wasted, disposed of or converted the property to his own use, is put in issue by the answer, and the circumstances of the loss are detailed in the answer. If the defendant is not held liable for the original taking of the property into his possession, he can only be held liable for such negligence in its transportation as would subject a carrier without reward to such liability. A mandatory or carrier without hire is only responsible for gross negligence: Angell on Carriers, Secs. 17, 21. The instructions given by the court in this case were as favorable to the plaintiff as he had any right to ask, upon the point of the care required of the defendant.

The judgment is, with the concurrence of the other judges, affirmed.

POWELL ET AL. v. REESE, Administratrix.

(7 Adolphus & Ellis, 426; 34 English Common Law R. 136. Court of Queen's Bench, 1837.)

Estate of intestate liable for certain of his torts. An administrator is liable to an action for money had and received by the intestate, for coal tortiously taken by him from the plaintiff's land, if the intestate has sold it and received the money, although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale.

Separate actions for a series of trespasses. Where part of the coal was raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass under stat. 3 and 4 W. 4, c. 42, s. 2, for so much as was raised within the six months, and also money had and received for so much as was raised before, the acts being distinct, and the two actions therefore not incompatible.

Assumpsit for money had and received by the intestate to the use of the plaintiffs, and on an account stated between the intestate and the plaintiffs, with promise by the intestate. Plea non assumpsit, with another plea not material here.

On the trial, before COLERIDGE, J., at the last Monmouthshire assizes, the facts (so far as material to the point here reported) were as follows: The intestate had been lessee under the plaintiffs of certain coal mines; the minerals under three closes had been excepted from the demise, but he had

worked them, brought the coals to the market and received the produce. The plaintiffs had sued the defendant in trespass, after the intestate's death, and recovered damages for the coals abstracted within the six months next preceding that event, availing themselves of the remedy given by stat. 3 and 4 W. 4, c. 42, s. 2. The present action was brought to recover damages for the proceeds of the sales of coals by the intestate from under the excepted closes, for the period antecedent to the six months before mentioned; no direct evidence of the amount obtained by the intestate for the coals was given. It appeared that they had been mixed with coals taken from the mines demised, and all sold together. The plaintiffs relied on the evidence of surveyors as to the quantity of coal which had been excavated. The defendant's counsel objected that action did not survive against the administratrix under these circumstances, and that, at any rate, the action of trespass which had been brought was inconsistent with the present action. The learned judge reserved leave to the defendant to move for a nonsuit, and the plaintiff had a verdict for the sum which the jury considered to be the value of the coal taken, deducting for the expense of raising and conveying it to market.

TALFOURD, Serjt., now moved according to the leave reserved. The first question is whether, generally, money had and received can be maintained against an administrator upon such a tort committed by the intestate, or whether it be a personal action which expires with the person. It is true that in many instances of tort the party injured is permitted to waive the tort, and to proceed for the money obtained by the tort-feasor, affirming his act. This point is discussed in *Hambly* v. *Trott*, 1 Cowp. 371. But here there was no evidence of the actual price, which seems necessary to the action for money had and received: *Harvey* v. *Archbold*, 3 B. & C. 626 (10 E. C. L. R. 203). Again, this was substantially an action for an injury to the freehold, and it has never been held that such injuries can be treated as contracts. The statutes 3 and 4 W. 4, c. 42, s. 2, seem to show that the legislature considered trespass to be the only remedy; otherwise the provision there would have been unnecessary. Secondly, the plaintiffs, by proceeding under the statute, have elected to

treat the act of the intestate as a trespass. They can not now waive the tort, and, if not, they can not bring the action for money had and received, which assumes that the act of the tort-feasor is affirmed.

Cur. adv. vult.

Lord DENMAN, C. J., in this (Michaelmas) term, November 9th, delivered the judgment of the court.

In this case we disposed of one ground on which a rule for entering a nonsuit was sought to be obtained upon the hearing. It remains to decide upon another, which arose under the following circumstances (his lordship then stated the facts).

It was objected, in the first place, generally, that no such action was maintainable; that the foundation of it was a tort, the remedy for which died with the person; and that the doctrine of waiving the tort and suing upon a contract implied by law, could not be extended to a case in which no remedy by action in tort existed to be waived. We were pressed, too, by the remark that such an action was of the first impression, and by the inference to be drawn from the language of the section above mentioned, and from the remedy there given. If, however, the legal principles upon which the action is maintainable are clear, these considerations ought not to prevail. In the present case the money which has been produced by the sale of that which had been wrongfully severed from the plaintiff's estate and converted into chattels, is traced into the pocket of the intestate. It can not be doubted that an action for money had and received would have been maintainable against him for that money. His personal estate has come to the hands of the defendant, by so much increased, and we can not see any grounds why the same action is not to be maintained against her who represents him in respect of that estate.

In the case of *Hambly* v. *Trott*, 1 Cowp. 371, Lord MANSFIELD very fully considers this subject, and lays down the distinctions which arise as to the surviving of remedies upon the cause of action, and the form of action. He observes that there "is a fundamental distinction. If it is a tort of injury

by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." The former part of this example illustrates the operation of the recent statute; in the latter, which is the present case, it was not needed.

But it was pressed on us, secondly, that, at all events, this action was not maintainable after recourse had been had to the statute first referred to; for that the plaintiffs having elected to proceed for damages for the trespass in part, could not split it and sue in contract for the other part. The conduct of the plaintiffs may have been vexatious; but that furnishes no legal answer to this action, because, in truth, the intestate was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries. They might indeed have recovered a compensation for all under the present form of proceeding, but they were not bound to do so.

Upon the whole there must be no rule.

Rule refused.

SMITH, Admx., v. WILMINGTON COAL MINING AND MANUFACTURING CO.

(83 Illinois, 498. Supreme Court, 1876.)

[1] **Contract surviving to administrators.** A coal mining company contracted with one Smith to deliver to him three car loads of coal each week, from April 15, 1872, to October 15th, of the same year, at three dollars and seventy-five cents per ton, and six car loads per week from said last mentioned date till April 15, 1873, at four dollars per ton.

[1] *Wentworth* v. *Cock*, 2 M. R. 470.

The company delivered coal as per contract until the death of Smith, in October, 1872, when they declined to deliver, on the ground of his decease. *Held*, that the death of one of the contracting parties did not put an end to such a contract, it not being of a personal character, nor within any other class of exceptional cases. That the administratrix had a right to demand its fulfillment, as she had done, and to recover damages for its non-fulfillment, either upon her own option, at her own risk, or under direction of the court, at the risk of the estate.

Appeal from the Circuit Court of Cook County, the Hon. JOHN G. ROGERS, Judge, presiding.

One Charles T. Smith, in his life-time, had a contract with the Wilmington Coal Mining and Manufacturing Company that it would deliver to him three car-loads of coal each week from the 15th day of April, 1872, to the 15th day of October, 1872, at the rate and price of $3.75 per ton, and six car-loads each week, from said 15th day of October to the 15th day of April, 1873, at the rate and price of $4 per ton.

It was proven the company entered upon the performance of the contract, and delivered all the coal it had agreed to deliver up to the 15th day of October, 1872. Smith died on the 11th day of October, 1872, but the company continued to deliver coal in fulfillment of the contract to the 15th day of October. The last car was ticketed or billed on the day last named, and the balance due defendant for coal delivered to that date was paid by plaintiff as administratrix. On demand being made by the administratrix, the company declined to deliver any more coal under the contract, placing its refusal mainly on the ground, the death of Smith had put an end to the contract.

The finding in the court below was against plaintiff, and she brings the case to this court on appeal.

ELDRIDGE & TOURTELLOTTE, for the appellant.

PALMER & COLT, for the appellee.

SCOTT, J., delivered the opinion of the court.

On the trial the court held the law to be, and so instructed the jury, it must appear affirmatively, from the evidence, that plaintiff had been directed and authorized by the county

court of the county in which administration was had, to carry out and perform the contract made with decedent, before any money could be had, unless there had been a breach in his life-time; and on the latter branch of the case, the court instructed that Smith died on the 11th day of October, 1872, and there had been no breach of the contract before that time on the part of the defendant. The charge of the court is subject to the criticism—it assumes there had been no breach of the contract in the life-time of decedent on the part of defendant; but it is chiefly erroneous because of the proposition of law it asserts in relation to plaintiff's right to recover on the contract.

Text writers noting the decisions on this subject state the law to be, that when the contract with the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all that deceased could have done, he may do so and enforce the contract: Parsons on Contracts, Vol. 1, p. 131*, 6th ed. Common law authorities sustaining the doctrine are: *Siboni* v. *Kirkman*, 1 M. & W. 418; *Wentworth* v. *Cock*, 10 A. & E. 33. Exceptional cases are, when the contract is of a personal character, or requires in its execution the exercise of peculiar skill or taste. But when the administrator undertakes to perform the contract of his intestate, it is upon his personal responsibility, and if losses are sustained he must bear them, and if profits are realized they become assets in his hands for the benefit of the estate. Such were the liabilities at common law imposed upon the administrator assuming to execute the contract of the decedent.

Our statute provides, "all contracts made by the decedent may be performed by the executor or administrator, when so directed by the county court." But it is apprehended this statute does not change the common law on this subject, except in one particular. Without this enabling statute the executor or administrator could not bind the estate, nor relieve himself from personal responsibility, but under its provisions, when directed by the county court to perform the contract, the estate may be charged with all losses that may be incurred, as well as receive all benefit of any profits that may be realized, and in that way the executor or administrator may be relieved from all personal responsibility.

In this case the county court did not direct the administratrix to perform the contract of decedent, but she chose to perform it for the benefit of the estate. Of course it was optional with her whether she would take upon herself that burden and risk, but it was her privilege under the law, if she chose to do so. It does not lie in the mouth of defendant to object.

It is a misapprehension of the law to suppose the death of one of the contracting parties put an end to the contract. For any breach after, as well as before, the death of such party, his estate would be liable to respond in damages. It is conceded the county court could have directed the administratrix to carry out the contract made with decedent. The admission implies the continued existence of a valid contract and for any breach thereafter the administratrix might maintain an action. But in our view of the law, she had that right independently of the statute, taking upon herself all the risk incident to the further execution of the contract.

On account of the erroneous instruction given, the judgment will be reversed and the cause remanded.

Judgment reversed.

ADAIR ET AL. v. BRIMMER ET AL.

(74 New York, 539. Court of Appeals, 1878.)

[1] **No power to organize mining company.** Wadsworth devised to his executors certain undeveloped coal lands in trust for his daughters, with power to lease, or sell and convey said real estate, and to invest the proceeds in other lands or buildings, or bonds and mortgages, or in such other securities as they shall deem safe, etc. The executors conveyed the lands for the purpose of organizing a mining company to develop them, and took stock of the corporation in payment. The funds of the company became exhausted and bonds were issued secured by a mortgage on the lands, and the bonds sold to raise money to build a railroad to the lands. To protect their stock the executors were compelled to purchase some of these bonds, which they did as an investment for the estate, crediting themselves with the purchase price thereof: *Held*, that notwithstanding the power of sale contained in the will, the executors were not authorized to make the disposition which they did

[1] *Wilkinson* v. *Stafford*, 1 Vesey, 32 *Post*, TRUST; *Twaddell's App.*, 5 Pa. St. 15, *Post* GUARDIAN AND WARD; *Estate of Millenovich*, 5 Nev. 184.

of the lands; that the willingness of the testator in his life-time to make a similar disposition of the lands, could not enlarge the powers of the executors; that the executors were responsible for the value of the land at the time they conveyed it away; that the bonds were not such a security as a prudent executor or trustee would voluntarily have accepted as an investment for trust funds, or as the rules of courts of equity would have sanctioned; and that the purchase of the bonds must be treated as an investment on their individual account, not chargeable to the estate.

[1] **Ratification by cestui que trust.** To establish a ratification by a *cestui que trust* it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his legal rights in the matter.

Accounting by executors. Debts owing by individual executors to the estate should remain in the account as assets of the estate and it is not proper to credit them to the executors as uncollected debts.

Payments by debtor executors. A mortgage debt due by the estate was with the consent of the executors canceled by the personal obligation of two of them who were indebted to the estate, but the estate afterward paid the obligation: *Held*, that under the peculiar circumstances of the case, it was not the intention of the parties to relieve the estate from responsibility and that the payment should be allowed.

Overpayments to legatees. Executors are not entitled to credit for interest paid to raise money with which to make advances to legatees beyond their distributive shares, nor can they claim credit for overpayments and thereby diminish or postpone the amounts payable to other legatees. Such excessive payments remain assets of the estate, and the executors are immediately liable to account for the same; nor can they apply them in anticipation of sums which may thereafter become due to the legatee so overpaid.

Duties generally. For the duties and liabilities of the executors of a large estate and the proper mode of accounting, see the opinion.

Liability for co-executor's default. Where one of the executors was intrusted with certain stocks and bonds on his promise to sell the same and pay the proceeds into the general fund, *held*, that trusting to this promise was not such negligence or improvidence on the part of the executors as to render them liable for the default of their co-executors.

Appeal from judgment of the General Term of the Supreme Court in the Fourth Judicial Department, affirming a decree of the surrogate of the county of Livingston, upon an accounting of the executors of James S. Wadsworth, deceased.

By the will of said deceased his sons, Charles F. and Craig W. Wadsworth, and Martin Brimmer, were appointed executors.

[1] *Rogers* v. *R. E. Lee Co.*, 2 M. R. 71.

The material clause of the will is as follows:

"I give and devise unto my executors hereinbefore appointed, the one half part of all the lands and real estate of which I shall die seized or possessed, situated out of the counties of Livingston and Monroe, in the State of New York; and I give and bequeath unto my said executors the one half part of all my personal estate, after the payment of my debts and the legacies specifically given in and by this will, as trustees of my daughters, Cornelia, Nancy and Elizabeth, to have and to hold the said real and personal estate as such trustees as aforesaid, to them and to their successors lawfully appointed, in trust as follows, that is to say: the one third part thereof to be so held for the benefit and during the life of each of my said daughters, the said executors, as trustees, to receive the rents, profits and income of said real and personal property, and to pay the same annually, in equal portions, to each of my said daughters, and the receipts of each of my said daughters, whether married or unmarried, shall be a sufficient voucher for the income of one third of the property hereby devised and bequeathed to my executors for the benefit of my said daughters.

* * * * * * * *

"Whenever either of my said daughters shall die, leaving issue her surviving, such issue shall take an estate in fee, in one third part of the real estate hereby devised to my said executors in trust, and one third part of the personal estate hereby bequeathed to my executors in trust shall descend to and vest in such issue; and whenever either of my said daughters shall die leaving no issue her surviving, then and in that case one third part of the real and personal estate hereby devised and bequeathed to my executors in trust, shall descend to and vest in my heirs-at-law in fee, in the same manner that the same would have descended and vested if this will had not been made, and the said daughter had died without issue before my decease.

"And I hereby authorize my said executors, as such trustees, and their successors, to lease, or sell and convey all or any part of the real estate above devised to them in trust for my said daughters, and to invest the proceeds in other lands, or buildings, or bonds and mortgages, or in such other

securities as they shall deem safe and for the greatest benefit of my said daughters, provided that three of said trustees consent to such sales or investments. Such lands, buildings, bonds and mortgages, or other securities when so acquired, to be held by said trustees and their successors upon the same trusts and to descend and go and be disposed of in the same manner that the property so sold would have been held, descended, gone and been disposed of, if the same had not been so sold and conveyed by said trustees.

"Whenever there shall be less than three executors and trustees competent to act in the execution of this will, or the trusts hereby created, it shall be the duty of the survivor or survivors to apply to the proper court for the appointment of other trustees and executors, and no act shall be done that shall bind my estate, or the funds belonging to said trusts, until such executors and trustees shall be appointed.

"It is my will, and I order and direct that no partition shall be made among my children of any of the real estate herein devised until four years after my decease, nor shall there be any distribution of my personal estate until four years after my decease."

The other half of the real estate, and of the residuary personal estate specified in said clause, the testator devised and bequeathed to his three sons.

The facts pertinent to the questions discussed are sufficiently stated in the opinion.

W. W. MACFARLAND, for appellants.

GEORGE F. DANFORTH, for respondent Brimmer.

W. F. COGSWELL, for respondent Charles F. Wadsworth.

RAPALLO, J.

The first exception to the surrogate's decree, contained in the petition of appeal, relates to the amount charged to the executors as the value of the coal lands in Pennsylvania, designated as the Glendower tract. On the 10th of October, 1864, the executors conveyed the share of this tract of which the testator died seized (being one undivided third of a tract of

1508 acres), to Franklin H. Delano, and John M. Forbes, owners of the other two thirds for the expressed consideration of one hundred and sixty-six thousand, six hundred and sixty-seven dollars ($166,667), and by a receipt indorsed on the deed, the executors acknowledged the receipt of that sum, as the full consideration money for the conveyance. They were permitted to show, however, on the accounting before the auditor, that the only consideration actually received by them for this conveyance, was 10,000 shares of the capital stock of a Pennsylvania corporation known as the New Boston Coal Mining Company. It appeared in evidence that the conveyance by the executors to Delano and Forbes, was made for the purpose of organizing the company. That its nominal capital was $2,000,000, and that the whole of the Glendower tract was conveyed to it, one fourth or $500,000 of the capital stock, at par, being paid to the executors for the one third of the tract owned by the testator. That expenditures were made on the lands by the company thus formed, out of moneys raised by sales of its stock and that after this fund had been exhausted, further sums were raised on bonds issued by the company to the amount of $500,000, secured by mortgage on its lands, for the purpose of building a railroad to its coal fields, and other improvements. That the company never paid any dividends on its stock, and although Mr. Charles F. Wadsworth, one of the executors, complained that it was notoriously mismanaged, he stated that it was useless to attempt any change in the management, as it was solely under the control of Mr. Delano, who held a majority of the stock. Mr. Brimmer also states in his correspondence with Mrs. Rogers that the company was very badly managed, but that he and Charles could not control the management of it.

It thus appears that by the action of the executors in regard to these lands, they were placed entirely out of their hands, and beyond their control, heavily incumbered by mortgage, and expenditures from which no return has been derived, and it is fairly to be inferred from the evidence that they have been virtually lost to the estate.

The learned auditor held that, notwithstanding the power of sale contained in the will, the executors were not author-

ized to make the disposition which they did of these lands, by devoting them to the formation of a *quasi* partnership to carry on the mining business, and that the willingness of the testator in his life-time to make a similar disposition of the lands, could not enlarge the powers of the executors, and the evidence of his views was material only to establish their good faith in the transaction; that no ratification of their dealings by the parties in interest had been shown or could have been made, the principal of the shares of the contestants in the estate being limited after their death to their children, and that consequently the executors must be held personally responsible for the value of the land at the time they conveyed it away. These views are sustained in the opinion of the learned auditor by cogent reasoning which it is not necessary to repeat, and his conclusions were adopted by the surrogate and by the Supreme Court at general term, and are not brought in question on this appeal. But in fixing the amount chargeable to the executors as the value of these lands, we think the conclusion of the auditor is based upon an evident misapprehension of the testimony. After referring to various elements of uncertainty in determining the value, he concludes that the most equitable mode of adjusting the valuation would be to adopt that of the testator; and he then proceeds to state that in May, 1864, the testator authorized Delano to sell his share for $75,000. This statement shows that the learned auditor has fallen into a grave error. The $75,000 referred to by the testator in his communication to Mr. Delano, was simply the proportion of purchase money which he desired should be paid in cash. In addition to this sum, payable in cash, the testator was by the proposed plan of organization to receive 2,000 shares (being one sixth) of the entire stock of the company to be formed, and to which the whole property was to be conveyed. The stock thus assignable to him was valued at seventy-five dollars per share, or $150,000, so that if the valuation of the testator be adopted, the amount would be $225,000, instead of $75,000. The stock of which he was to receive one sixth represented not only the entire land, but $225,000 of working capital which was to be paid into the company for the development of the property. By the proposed arrangement he would have parted with only one half of his interest for the

$75,000 cash, the other half being retained in the shape of one sixth of the entire stock of the company, and the half thus retained being enhanced in value by the accession of $225,000 of working capital. From the correspondence between Mr. Delano and the testator, and the various plans discussed between them, it is apparent that they placed a very high estimate upon the value of the property, and that the various propositions which they held under consideration purported to yield in cash and stock for the whole property, amounts varying from $1,200,000 to $875,000. Mr. Delano, in discussing one offer received, wrote to the testator that it would scarcely be an object to be connected with the scheme if it would yield only $800,000 for the entire property, and he proceeded to show that by leasing, it could be made to produce in three years a rental of $100,000 per annum, the interest of $1,400,000. the testator in reviewing the different schemes of organizing a company, insisted that no plan should be adopted by which the cash payment of the owners of the land should be reduced below $225,000 or $75,000 for his share. This is what the auditor has erroneously assumed to be the testator's valuation of his entire interest. In the disposition made by the executors, it will be observed, no cash payment was stipulated for, but the whole purchase money was paid in stock.

If the testator's own valuation should be adopted as the guide, it is clear that a much larger and more than double the sum fixed by the auditor should be charged to the executors.

Proceeding next to the testimony of the witnesses examined on the subject of value, we find no evidence which sustains the valuation adopted by the auditor. Three witnesses only undertake to affix a specific market value to the lands, two on the part of the contestants and one on the part of the executors. Mr. Thomas testifies that he was in 1864 engaged in the business of buying and selling coal lands in the region, and had been so engaged for eight or ten years, and was acquainted with the value and market demand for such lands in the county where the tract in question was situated, and was, and had for twenty years been acquainted with the particular tract in controversy, and with its value since 1864. That in 1864 he would have paid for that land from three to four hundred dollars per acre as a speculation for future

sale, and that it was as valuable at the date of his examination (1873) as in 1864, if not more so. That there was a large demand after 1864 for undeveloped coal lands situate in that county; that many thousands of acres had been sold, and there certainly would have been no difficulty in effecting a sale of those lands at, as he believed, a higher price than that named by him. That he had personally examined the land and that adjoining, and that the price of coal land increased rapidly from 1863 and 1864 up to 1870. This valuation would amount to $450,000 to $600,000 for the tract, or $150,000 to $200,000 for the testator's share.

The other witness on the part of the contestants, Mr. George C. Potts, testified that he was the general superintendent of the New Boston Coal Company, which operated the tract in question; was largely engaged in mining coal in that county; was acquainted with the value of, and market demand for such lands in that region about that time, and was thoroughly acquainted with the tract in question; that in 1865 they would have been cheap at $350 per acre, and he believed them worth more at the time of his examination (1873); that there was a very great demand for undeveloped coal lands in that county in 1864, and for two years afterward.

The only other witness who speaks upon the subject is Mr. Stephen Harris, who, being asked by the counsel for the executors to state whether in 1864 and 1865 the lands had any, and what market value, answered that he did not consider himself a competent witness on that point as he had nothing to do with sales at that time. After this statement, the witness being pressed to put a price upon the land, said the best estimate he could make was from $100 to $150 per acre, but that he made it with the qualifications before stated, as to his want of experience.

This testimony can hardly be considered as admissible after the disclaimer of the witness, and certainly not as of any weight. Other witnesses were examined as to the condition of the property, its quality as compared with other coal lands, its remoteness from railroad facilities, its unproductive state, and the necessity of a large expenditure of money, to render it productive, and the witnesses on both sides concur in stating that mining coal is an extremely hazardous and uncertain

business. But no witness except Harris undertakes to controvert the statements of Thomas and Potts, as to the market value of the land, such as it was, and the witnesses on the part of the executors do not deny that the land was salable in 1864 and 1865, one of them testifying that almost anything that had or was said to have coal in it could have been sold at that time, such was the general excitement.

The finding of the auditor as to the value of the land at the time of the conveyance can not be sustained, and was manifestly made under a misapprehension of the testimony as to the testator's estimate. We think therefore that this item should be remanded to the surrogate for re-adjustment. Further evidence may be given, and particulars gone into as to the terms upon which the property could have been sold, by which a more accurate conclusion can be arrived at as to what could have been realized from the land by a proper sale, at or about the time it was conveyed to Messrs. Delano and Forbes. The executors should be charged with that sum with interest from the time of such conveyance at the rate of six per cent. per annum.

While the contestants are entitled to have the executors charged with the full market value of the land or the amount which could have been realized by a proper sale thereof, yet there being no ground for charging bad faith or any improper motive upon the executors, in this transaction, but simply an erroneous view of their powers and duties, great caution should be exercised in ascertaining the sum for which they are chargeable, and care should be taken not to mulct them in a greater amount than the estate could have realized from a sale of the land, at or about the time it was conveyed to Delano and Forbes.

The second error assigned is the credit to the executors of $52,500, as an investment made in 1869 and 1870 in sixty-two bonds of the New Boston Coal Mining Company. These bonds were part of the before-mentioned issue of $500,000 of mortgage bonds of that company, made for the purpose of raising funds, to construct a railroad to its coal fields, and other improvements. Their security was dependent upon the success of the enterprise, which was purely speculative. They were not such a security as a prudent executor or trustee

would have voluntarily selected for the investment of trust funds, as the rules of courts of equity would have sanctioned.

These rules have been adopted in the light of experience, and adherence to them is essential to save trust estates from waste, especially in these days of almost innumerable speculative corporate enterprises. It is true that it was said in *King* v. *Talbot*, 40 N. Y. 90, per WOODRUFF, J., that it was not necessary to hold that under no circumstances could an investment in the bonds of a railroad or other corporation, secured by a mortgage upon real estate, be deemed suitable or proper. That if the real estate was ample to insure the payment of the bonds, they were not necessarily to be regarded as inferior to the bond of an individual secured by mortgage, but that it would be open of course to all the inquiries which prudence would suggest if the bond and mortgage were those of an individual. The nature, location and sufficiency of the security and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund must of course enter into the consideration.

Applying these tests, the investment in question will not bear scrutiny. The security, though technically real estate, was of the most speculative character, an undeveloped coal mine, requiring a large outlay to make it available, and although it had at the time a market value, it was sought for by purchasers with the view of being used, and its value consisted in being available to carry on the mining business, which the testimony shows was of the most hazardous and uncertain nature. Oil lands at one time commanded enormous prices, but although they were real estate, no one would pretend that they would constitute a suitable basis for an investment of trust funds as a real estate investment. Looking next at the amount of the security, we find that even the speculative value was not such as to warrant a loan of $500,000 on the security of the land. The auditor places its value at $225,000, but assuming it to have been more than double that amount or of the value named in the deed from the executors, $500,000, or any other figure for which the executors would be willing to be held responsible in accounting for the value of the land, it would still fall far short of a sum sufficient to warrant a loan of half a million. It is said that the money

loaned was intended to be expended in the improvement of the land by constructing a railroad, but that engagement of the corporation was not real estate security, upon which a trustee would have the right to rely, nor was there any certainty that the railroad when constructed would be of any value. It can not be pretended that a trustee would be justified in investing trust funds on the security of an unconstructed railroad. The terms of the mortgage and its availability for the protection and ultimate realization of the fund, are not disclosed by the evidence, and all the light we have on that subject is that the executors held only about one eighth of the bonds, which ordinarily would not enable them to control in the matter of foreclosure. It does not appear that the property was yielding any profits or income out of which the interest could be paid. Regarding the investment as one voluntarily made by the executors, with the view merely of placing the trust funds at interest, it can not be sustained without overthrowing all the rules which have been estabished in regard to the securities in which trustees may invest.

It is contended on the part of the executors that the terms of the will gave them a larger discretion in the matter of investments than the law gives to trustees generally, because it authorizes the executors to invest the proceeds of sale of the lands devised in trust for the testator's daughters, in other lands or in bonds and mortgages, or in such other securities as they shall deem safe, and for the greatest benefit of his said three daughters, provided that three of the trustees consent to such investments. It is very questionable whether, even if the investment had been made in the exercise of this power, the executors could have been sustained in the selection of so speculative a security as the one in question, but it is quite clear that it was not so made, and that the purchase of these bonds was not for the purposes of investment, or because the executors in their discretion deemed it a safe mode of placing surplus funds at interest, but that it was a *quasi* compulsory advance to promote the mining business and protect the stock which the executors had received in payment for the coal lands, and which was of the nominal value, at par, of $500,000. So far from being a discretionary investment of funds in their hands, the case

shows that the executors had to raise the money to pay for the bonds by discounting their individual notes; that the stockholders were requested to take these bonds *pro rata* in proportion to their stock, after the other funds of the company had been exhausted; and Mr. Brimmer writes to Mrs. Rogers, in 1871, that this investment in bonds was necessary to save the interest of the estate in the company, and that he thinks them pretty safe. It is nowhere pretended that the transaction was a voluntary investment of funds under the discretionary power. If the executors had been empowered by the will to carry on the mining business, the purchase of these bonds might be justified as a necessary expenditure or advance for the promotion of that business, but not otherwise. But it having been held that they were not so empowered, and that they had no right to acquire the stock as they did, it would be extremely incongruous to hold that they were entitled to use the funds of the estate, and put them at hazard for the protection of the stock. Furthermore the necessary consequence of holding that the transaction by which the land was disposed of and the stock acquired was unauthorized and illegal, and that the executors are accountable to the estate for the market value of the land, is that the stock which they received became their individual property, and they carried on the business for their individual account. Such being the case, advances made in that business, or for the enhancement of the value of their stock, can not be charged to the estate. To hold otherwise would justify the use of the trust funds and putting them at risk by the executors in their own business.

The testimony as to the ratification of these transactions is contradicted by the contestants, and the auditor has found against such ratification. We concur in his conclusion. To establish a ratification by a *cestui que trust*, the fact must not only be clearly proved, but it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also, in a case like the present, that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his or her legal rights in the matter. Confirmation and ratification imply, to legal minds, knowledge of a defect in the act to be confirmed and of the right to reject or ratify it. The *cestui que trust* must therefore not only

have been acquainted with the facts but apprised of the law, how these facts would be dealt with by a court of equity. All that is implied in the act of ratification, when set up in equity by a trustee against his *cestui que trust*, must be proved, and will not be assumed. The maxim "*ignorantia legis excusat neminem*" can not be invoked in such a case. The *cestui que trust* must be shown to have been apprised of his legal rights: *Cumberland Coal Co.* v. *Sherman*, 20 Md. R. 151; S. C. 30 Barb. 575; *Lammott* v. *Bowley*, 6 H. & J. 526.

The evidence in this case does not come up to the required standard, even if uncontradicted, and, moreover, the contestants could not, by any ratification, bar the rights of the children entitled in remainder to the principal of their shares. The executors no doubt acted on the supposition that they were dealing with this coal property as the testator would have done had he lived, and with the view of obtaining more for the property than could have been realized from an actual sale, two of them being personally interested in them as devisees. But, as remarked by the auditor in his opinion, the testator did not transmit to the executors the power so to deal, nor could he transmit to them his personal influence over the other owners, or the personal skill and judgment which he might have used for his protection had he himself embarked in the joint enterprise. If those of his sons who were executors were willing, for the prospect of realizing a large sum by the speculation, to hazard their shares of the lands and their capital in developing and operating the mines, matters should have been so arranged that the shares of the land held in trust for the daughters and their issue should have been sold, and realized their fair, salable value, free from the risks and complications which have ensued. The credits mentioned in the second exception, with interest from the dates of the payments for bonds, should be charged back to the executors, and all sums charged to the executors for interest collected on the bonds should be stricken out of the account, and the interest account re-adjusted accordingly. Following, however, the case of *King* v. *Talbot* (*supra*), the interest charged the executors on these items should be at the rate of six per cent. per annum with annual rests.

We have examined the third, fourth, fifth and sixth excep-

tions, and find no sufficient reason for interfering with the decree of the surrogate in respect to the matters to which they refer. The seventh exception relates to the credits to the executors of the sums which were included in the inventory as debts owing to the testator at the time of his decease by Charles F. Wadsworth and Craig W. Wadsworth, two of the executors. These sums were, under the statute, assets in the hands of the debtor executors, and should not be credited back as uncollected debts, but should remain in the account. They are assets of the estate, and necessary ingredients in ascertaining the total amount of the estate and the amount of each distributive share. The account is a joint one, and should exhibit the whole estate in the hands of all the executors, independently of the question of the personal liability of the executors, as between themselves, to the legatees. That matter must be separately disposed of. The auditor expressly determined that these debts should not be credited as uncollected assets, and no reason is shown for departing from this decision. This exception should be allowed.

The eighth exception relates to the allowance of payments made by the executors to Mr. Murray on the special bond for an annuity, given by Charles F. and Craig W. Wadsworth, in satisfaction of the mortgage of $37,000, held by Mr. Murray. This mortgage was payable by the estate, as the property covered by it was devised in trust for the sons, free of incumbrances. If the sons had paid the mortgage, they would have been entitled to credit for the sum paid, and as they substituted their own individual obligations in place of the mortgage, they were for the same reason entitled to re-imbursement of what they might thus pay. But it is now contended by the contestants that the sons being debtors to the estate to an amount exceeding the sum assumed by them, their co-executors should have allowed them in reduction of their indebtedness, the amount they assumed for the estate, and left Mr. Murray to look to them personally for the payment of their own bond. That Mr. Murray had no right to demand payment from the estate, he having relinquished and canceled his lien upon the land, and the obligation of the testator, and accepted in place thereof the individual obligation of the two sons, and that he could only look to them as

individuals. That consequently the executors were not justified in making payments to Mr. Murray for which they were not legally liable, and losing the opportunity of saving a part at least of the amounts due from the two sons.

But upon looking into the evidence it appears that the change of the original bond and mortgage into an agreement or bond for an annuity, was made with the assent of all the executors. That it was advantageous to the estate, and that the bond was given by Charles F. and Craig W. Wadsworth as individuals, in order to obviate the objection that the executors, as such, had no power to give the bond. It may reasonably be inferred from the evidence that the bond was given in behalf of the estate, and that it was not the intention of the parties that the estate should be relieved of responsibility to Mr. Murray for the amount due him, and that he should look only to the individual responsibility of the two sons. The obligation was treated as a continuing indebtedness of the estate, and under the peculiar circumstances of the case, we think the payments made thereon by the executors should be allowed.

The ninth exception is to the allowance of certain small items called exchange, amounting in the aggregate, according to the schedule referred to in the appellant's points, to the sum of $1,003.63. The items are very numerous, consisting of small sums averaging under ten dollars each, some of which are explained by testimony, and others not. Some of these items may have been improperly allowed, as, for instance, exchange on notes discounted to raise money to pay for the new Boston Coal Company bonds, and other discounts obtained by the estate to raise money for the accommodation of Charles F. and Craig W. Others may be allowable, as, for instance, exchange or drafts remitted to the executors in payment of debts due to the estate. We do not deem it necessary to go into a detailed examination now of the evidence bearing upon these items. The tenth and eleventh exceptions, which relate to interest paid by the estate on discounts and otherwise, depend upon the same questions. Mr. Brodie testifies that the money borrowed was used in part in payments to members of the family, those to Charles amounting to most, part to Craig and the others, and Mr. Brimmer

writes that he objected to the ready money of the estate being used in advances to Charles. The amount involved in these exceptions is not large compared with those involved in the others, but the contestants have a legal right to insist that their shares should not be diminished by payments of interest made to raise money for advances to their brothers, in excess of their distributive shares, especially where, in the case of Charles, at least, a considerable amount of these advances will be lost to the estate by reason of his insolvency.

As the interest account will necessarily have to be re-adjusted, the accounts embraced in the ninth, tenth and eleventh exceptions should be referred back to the surrogate for re-examination and adjustment, and the expenditures for exchange and interest necessarily incurred for the benefit of the estate can then be ascertained.

The twelfth exception is, that the executors should be charged with all moneys borrowed and debts incurred by them, which at the date of the account were unpaid, and for which the estate was liable. This exception does not point out any sum so borrowed and not charged, and for which the estate is liable, and we can not be expected to wade through the accounts and evidence to ascertain whether such a fact exists. The notes discounted appear to have been the individual notes of the executors.

The thirteenth exception is, that the executors have not charged themselves with a sufficient amount for interest. Of course the exceptions already allowed will increase the amount of interest chargeable to them. The further claim is made that interest should have been computed to the date of the decree, July 24, 1876, instead of December 31, 1871. All the accounts are made up to the last named date. The accounting does not purport to be a final one, nor to dispose of the whole estate. The interest can not be brought down without also bringing all the accounts down to the date of the decree. The state of the accounts on the 31st December, 1871, when established, will furnish the starting point for a further account, or for a final one when the estate is in a condition for final settlement.

The fourteenth exception is to that portion of the summary of the account contained in the decree, which credits to the

executors all the payments made to legatees, and the interest charged in their accounts, without regard to their distributive shares. The exception is, we think, well taken. The account should be made up so as to show in the first instance the net amount of assets in the hands of all the executors collectively, and the distributive share to which each legatee is entitled. In ascertaining the amount, the executors are entitled to credit for payments to legatees, only to the extent of the distributive share to which each legatee was entitled at the time of the accounting. If the executors have overpaid any of the legatees, they must look to such legatee for re-imbursement. They can not claim credit for the amount so overpaid, and thereby diminish or postpone the amounts payable to other legatees: *Willcox* v. *Smith*, 26 Barb. 340. The question, which of the executors are individually responsible for the balance thus appearing, must be separately determined. It can not be summarily disposed of by crediting in gross to all the executors the entire sum advanced and charged to legatees in excess of their shares and the interest thereon. When excessive payments have been made by one of several executors, out of moneys which have come to his hands separately, and have never been under the control of the other executors, he will be held solely responsible for so much of the fund as has thus come to his hands, and be credited only with such amounts as have been legally paid out, or if he be himself the legatee who has been overpaid, with such sum as he was legally entitled to retain for his distributive share. But the excess in his hands can not be subtracted from the general account of all the executors, as a payment to a legatee. It must remain in the account as so much assets of the estate. When the whole balance of the estate not legally disposed of is thus ascertained, the question in what proportions the several executors are liable for such balance must be determined, but the total balance must first appear without regard to that question.

The fifteenth and sixteenth exceptions bring up the matter of the individual or joint liability of the executors, and present very serious questions. By the account as settled by the auditor, it appears that the balance of principal received by the executors after deducting sums paid out for debts, expenses and investments, and other payments, was $263,270.93

and the balance of income was $247,666.35, which included interest charged to the several legatees who had overdrawn. The total sum for distribution was consequently $510,937.28. Charles F. Wadsworth was entitled under the will to one sixth of this amount, viz., $43,878.49 of principal, and $41,-277.72 of income, making together $85,156.21. He was, however, indebted to the estate at the testator's death in the sum of $64,710.92, and had since that time drawn from the funds of the estate his whole share of the income, and other sums amounting with interest to $245,256.30, in addition, leaving him indebted to the estate on the 31st December, 1871, in the sum of $309,967.22, over and above his share of income, or $266,088.73, over and above his share of principal and income. A like indebtedness to the estate appears on the part of Craig W. Wadsworth, another of the executors, to the amount of $60,880.52, over and above his distributive share of principal and income up to the date of the accounting. In the form in which the account is settled by the decree, by crediting to the executors as uncollected the debts due from Charles F. and Craig W. Wadsworth at the testator's death, and by crediting back to the executors all the payments to those two sons, and the interest charged to them, the balance for which the executors are held jointly and severally liable, is reduced to $15,005, and Craig W. and Charles F. Wadsworth are respectively held solely liable for the sums due from them. Charles F. Wadsworth having become insolvent and decreed a bankrupt, it becomes an important question in the case to examine the circumstances under which the advances to him were made, and to determine whether his co-executors are liable for them, or any part of them. Craig W. Wadsworth has departed this life, and it is not alleged that his estate is insolvent, and probably his interest in the property not distributed by the decree in this proceeding will be sufficient to cover the amount due from him. The amounts mentioned in the decree will of course be changed by the modifications of the account produced by the allowance of some of the contestant exceptions, but the question of the liability of the executors can now be determined.

For so much of the indebtedness of Charles F. Wadsworth as existed at the death of the testator, he of course is solely

responsible, it being assets in his hands over which the other executors never had any control. This indebtedness (about $65,000 of principal) is to be taken into account, however, as reducing or satisfying the amount which he was entitled to draw as his distributive share of the principal and income of the estate and which amounted on the thirty-first of December, 1871, to about $85,000 on the basis of the account as settled. Interest being chargeable to him on his indebtedness, from the date of the death of the testator, it is self-evident that this indebtedness was at all times from the death of the testator until the thirty-first of December, 1871, more than sufficient, on the basis of these accounts, to satisfy any sums which he was entitled to draw as his distributive share. All drafts made by him, therefore, from the time of the testator's death were, on the basis of the account as settled, in excess of the share he was entitled to draw at the time. The modifications of the account will make this excess still greater. These overdrafts appear to have been authorized and allowed by the other executors up to a certain amount, in anticipation of the sum to which it was supposed that Charles F. Wadsworth would ultimately be entitled on a final division of the real and personal estate, and it was not until after that amount had been reached and passed, that Mr. Brimmer, the executor whose liability is now the principal question, interposed, and objected to further payments to him. At this time the advances made to Charles F. Wadsworth by the estate, together with the debt due by him to the testator, amounted to $180,000, and it was then supposed that his interest on the ultimate division would reach that sum, and that no loss would accrue to the estate by reason of the advances to him.

The first question naturally in order is, what responsibility the other executors incurred by the advances to Charles up to this stage of the account. Charles being one of the executors, had equal power with the others to collect in the assets of the estate, and it is clear that if this indebtedness had arisen from the mere retention by him of funds collected by him as executor, and which had never been in the custody or under the control of the other executors, and they had not assented to his use of those funds for his own purposes, they

would not be liable therefor. But it is equally clear, that if the sums were advanced to Charles out of a fund which had been collected, and had come into the possession of the other executors, or the joint possession and control of all the executors, and they were so advanced with the consent or acquiescence of the other executors, the advances were made at their peril. If made in anticipation of the share to which Charles would be entitled on a final division, the executors consenting to such advances became liable, not only to make good to the other distributees any excess of advances to Charles beyond his ultimate share, on the final distribution, but at all intermediate stages to make good all payments which are due or payable to the other distributees under the provisions of the will. They stood on the footing of assets collected by them, and paid over to their co-executors. Executors have no right by advancing to one distributee before he is entitled, to postpone others when entitled to payment, and when such distributee is also an executor, the excess advanced to him must be deemed assets of the estate for which all are accountable. The three daughters of the testator, for instance, who were entitled each to one sixth of the annual income, could not be deprived of this income as it accrued by advancing the principal of the estate to Charles, nor should it be diminished by the advance of a part of such principal. If the advances were made by or with the consent of the other executors they are bound to account for the income as if the funds were still in their hands invested. And to all intents and purposes, and at all stages of the accounting, funds advanced to one executor in excess of the share to which he is then entitled as legatee, if made by or with the consent of the others, must be deemed assets remaining in the hands of all the executors, and they are jointly and severally accountable therefor as such, and they and not their *cestuis que trust* must look for re-imbursement to the debtor, executor, or to any share of the estate to which he may ultimately be entitled as legatee. If this share turns out to be sufficient, they can protect themselves. If insufficient the loss must be theirs, and not that of the beneficiaries under the will. Sums thus advanced can not nor can the interest thereon, be charged in the accounting exclusively to the executor receiving them and de-

ducted from the joint account, but must be included in the general balance for which the executors are jointly and severally liable.

It remains, then, to be examined, whether the advances made to Charles from time to time in excess of the share to which he was, at the time of such advances, or up to the time of the accounting, entitled in his own right, were made under such circumstances that the other executors are liable therefor. It appears from the evidence that after the death of the testator the financial affairs of the estate were conducted by a common agent of the executors, Mr. Janes, at the office the testator had kept in his life-time at Geneseo. The executors, Charles F. and Craig W., gave their personal supervision to the affairs of the office, the other executor, Mr. Brimmer, being a non-resident of the State, and occasionally in Europe, but visiting the office several times a year and examining the accounts. The funds and securities of the estate were held and payments made exclusively by Mr. Janes. The securities were kept at the Genesee Valley National Bank, in a tin trunk in their vault, subject to the order of Mr. Janes, who kept the key personally, without any interference by either of the executors. Mr. Janes testifies that on one occasion Mr. Brimmer looked over the list of securities, but none of the other executors had any access to them, and whatever they wanted they had to get from him, Mr. Janes; that the bank account was kept in the name of Mr. Janes as agent, and no bank account was kept for the estate except in his name; that he drew the checks, and no one else drew any without his written consent, which was given on two or three occasions only, to Craig and never to Charles; that Mr. Brimmer examined the books whenever he was at the office; that when Craig and Charles wanted money he, Janes, advanced it. Mr. Janes testifies that on some occasions in 1866 and 1867, Mr. Brimmer instructed him to pay money to Charles, and in 1869 forbade his paying any more money to Charles, stating that he had got his share fully then; that prior to that time Mr. Brimmer had given no directions against Craig and Charles having money.

It appears that the overpayments to Craig and Charles were made in this manner by Janes out of the funds held by

him as agent for all the executors. It would present a serious question whether this fact alone would not be sufficient to render all the executors jointly liable for the application of these funds, whether the possession of Mr. Janes was not their possession, and any disposition of them made by him, their joint act. If the funds had been embezzled or misapplied by Mr. Janes, all the executors would have been liable for the loss, and if they permitted him to advance them all to one of the executors, and they were thus lost, there would be much force in the argument that the funds having come to the joint possession of the three executors, all were bound to see to their proper application, and were responsible for a misapplication by the common agent, even without their express consent. But it is not necessary to the present case to rest wholly upon that ground, for there is ample evidence of the acquiescence of all the executors in the advances made up to the point now referred to. As has been shown, the sum due from Charles at the death of the testator was assets in his hands more than sufficient to cover any sums distributable to him at any time up to the date of the accounting, and therefore all his drafts were overdrafts. Should this prove, on a re-examination of the account, not to be strictly accurate, it will not affect the principle, for that will apply to all drafts which were in fact in excess of the sum then due him, whatever the amount. We find, in Mr. Brimmer's correspondence, an explanation of the mode in which Charles' debt due to the estate (which then [in 1871] amounted to $327,000) had accumulated, and this explanation admits that at least $100,000 of the advances were made with the express consent of Mr. Brimmer. He says that $50,000 was advanced him on a mortgage of his share of the children's estate, which he deemed secure enough, though he did not like that use of the ready money of the estate. That another $50,000 was advanced about 1866. That Mr. Burden had earnestly asked his (Mr. Brimmer's) consent to this as the only means of saving Charles from failure at that time. That he (Mr. Brimmer) refused, but finally yielded. The result of these transactions was, that in August 1867, Mr. Brimmer being in Geneseo, and about to leave for Europe, found that the debt of Charles to the estate (including the $64,000 due at the testator's death) had mounted up

to $180,000. Mr. Brimmer considered that about the value of Charles' interest in the estate, and that up to that time it was safe enough against loss; and he says that it was then clearly understood between the executors that Charles could and should draw no more money from the office. Mr. Brimmer then went to Europe, and remained absent until the summer of 1869.

It is said that the $50,000 mortgage was almost wholly paid, out of sales of the mortgaged lands, but it does not appear that any account was taken of the mortgage, as the whole sums advanced to Charles were regarded as a lien on his share. The alleged payments, however, do not appear to have reduced Charles' indebtedness, as it kept steadily increasing; and at the time of the last advance of $50,000 Mr. Brimmer must have known the state of the account, and the evidence shows that up to $180,000, he did not object to the advances. Mr. Brimmer admits in his testimony that he knew from time to time as the accounts were presented to him, that Charles was drawing more than his share, as compared with that of the other children, and that he remonstrated with him but took no steps to prevent him. That up to the time he, Mr. Brimmer, went to Europe, he supposed that Charles' debt was hardly equal to his share of the whole estate, including the real estate, and that at that time he, Mr. Brimmer, said to him (Charles), that he had drawn all that he ought to draw, and he should draw no more, and he agreed to that, and Mr. Brimmer rested on his good faith and agreement not to do so, and relied for equalizing his account with the other children upon his interest in the real as well as the personal estate. At the time here referred to, as has been before stated, Charles' debt amounted to $180,000. It is not necessary for the purpose of establishing Mr. Brimmer's liability for these advances, to show his express consent to them. Where an executor by his negligence suffers his co-executor to receive and waste the estate when he has the means of preventing it by proper care, he is liable to the beneficiaries under the will for the estate thus wasted: *Clark* v. *Clark*, 8 Paige, 153.

Upon all the evidence the auditor held that the co-executors of Mr. C. F. Wadsworth were ultimately responsible to the other

beneficiaries under the will to make good these advances up to $180,000, if the interest of the debtor was insufficient for that purpose. This opinion was not, however, carried out in the surrogate's decree, for in that decree all the advances to Charles F. are credited to the executors and charged to him exclusively, and no liability, contingent or otherwise, for any part of them, is imposed upon his co-executors.

We concur in the opinion of the learned auditor that the co-executors are ultimately liable for this amount, but we do not think it goes quite far enough. We think they are immediately liable to account for all sums paid over by them, or by their authority to their co-executor, in excess of the amount then due him in his own right. Such excessive amounts remain assets of the estate, and can not be applied in anticipation of sums which may thereafter become due him as legatee, and certainly not in anticipation of the value of his portion of the real estate on a future partition thereof. The executors appear to have acted on this principle up to the time of the accounting, for they have annually credited to the other legatees their shares of the interest accruing on the sums advanced to Charles and Craig. But on the accounting they sought to recall these credits.

For the indebtedness of Charles, existing at the time of the departure of Mr. Brimmer for Europe in August, 1867, or so much of it as is in excess of the amount payable to Charles at the time of the accounting, less the portion of indebtedness which existed at the death of the testator, Mr. Brimmer should be held responsible with the other executors, and the amount due by Charles at the testator's death, with the interest thereon, should be first applied to the extinguishment of his distributive share of the estate. There appears to be no dispute as to the concurrence of Craig W. in the advances to Charles.

As to the advances to Craig W. the same principles should be applied, but in all probability these will be, or have been, re-imbursed by his share of the estate. The subsequent indebtedness of Charles appears to have arisen principally from the appropriation by him to his own use of about $60,000, proceeds of certain stocks and bonds which were sold by him for the estate.

These securities were intrusted to him for sale, on his promise to pay the proceeds into the office, which he failed to perform. He received these proceeds in his capacity of executor and they never came into the possession or under the control of his co-executors. We concur in the opinion of the auditor that they are not liable for the default of Charles in respect to these securities, and that permitting him to act in effecting their sale, and trusting to his promise to pay the proceeds into the office, was not, under the circumstances proved, such negligence or improvidence as should render them liable for his default. For that portion of the assets Charles should be held solely responsible, but his share of the estate should be bound therefor. The remaining portion of the indebtedness of Charles appears to have arisen from the accumulation of interest, and perhaps from further sums obtained by Charles from the funds of the estate. In what manner they were obtained does not distinctly appear, but it is quite apparent that they were obtained without the consent or approval of Mr. Brimmer, and sufficient facts to charge him therewith do not appear. The interest on the sums advanced to Charles, and for which Mr. Brimmer is chargeable must, of course, be included in the amount of his joint and several liability.

The other exceptions relate mainly to the form of the account except that as to commissions; with the allowance of these we have concluded, under the circumstances, not to interfere.

The judgment of the general term, and the decree of the surrogate should be reversed, and the account remanded to the surrogate to be re-adjusted in conformity with the opinion. The amount chargeable to the executors for the value of the coal lands, should be ascertained by the surrogate on a rehearing, and such other proofs as either party may desire to introduce, and the amount as thus ascertained inserted in the account. The costs of this appeal should be paid out of the estate.

Ordered accordingly.

All concur.

1. Administrator compelled to comply with contract of his intestate to receive slate: *Wentworth* v. *Cock*, 2 M. R. 470.

2. Devise of pits and veins of clay passes only such as were open at date of will: *Brown* v. *Whiteway*, 8 Hare Ch. 145.

3. A direction in a will that the testator's trade, that of a coal operator, shall be carried on, does not of itself authorize the mortgage of his real estate, not employed in the trade, for the purpose of carrying it on: *M'Neillie* v. *Acton*, 4 De G. M. & G. 744.

4. Shares of mining stock having come into the lawful possession of an administrator appointed in Nevada, are assets in his hands, although the corporation exists by the laws of California: *Van Bokkelen* v. *Cook*, 9 Rep. 502; *Post* STATUTE OF LIMITATIONS.

5. The right of action for ore taken is not lost by death of the trespasser: *Winchester* v. *Knight*, 1 P. Wms. 406.

6. A probate court may, by ord r, allow an executor to pay assessments on mining stock: *Estate of Millenovich*, 5 Nev. 163.

INDEX.

ABANDONMENT.

1. *Abandonment or forfeiture by tenant in common.*—The possession of one tenant in common is the possession of all. The mere fact that one goes away leaving the others in possession creates no presumption of abandonment; nor does his refusal to pay assessments of itself create a forfeiture. In order to enforce the forfeiture of his interest some appropriate suit must be undertaken to liquidate the demand and sell his interest, or there must be clear and unequivocal proof of abandonment. *Waring* v. *Crow*, 205

2. *Proof of abandonment under general denial of title.*—The allegation that the plaintiffs had the title to the mining claim in controversy at the date of the defendants' entry being material, the defendants may, under a general denial, prove an abandonment and forfeiture of the plaintiffs' claim previous to the defendants' entry. *Bell* v. *Brown*, 240

3. *Abandonment—District rules.*—The failure to perform the amount of work on a mining claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another. *Depuy* v. *Williams*, 251

4. *Idem—Collusion.*—Where upon a question of abandonment, the plaintiffs offered to show that defendants went into possession of the mining ground by collusion with one of the plaintiffs. *Held*, that the evidence upon such naked offer was well excluded; *aliter* if offered with evidence showing the agreement of such plaintiff with his fellows to hold the claim for them, or on their account. *Id.*

5. *The abandonment of an oil lease* is a question of intention to be found by the jury on an investigation of the facts. *Karns* v. *Tanner*, 289

6. *Instructions.*—For approved instructions upon the subject of abandonment, see statement of the case. *Waring* v. *Crow*, 204

See APPROPRIATION, 2; ESTOPPEL, 13.

ACCIDENT—See NEGLIGENCE, 1.

ACCOUNT—See EQUITY, 4; EXECUTORS AND ADMINISTRATORS, 5; LEASE, 2.

ADMISSIONS.

1. *Admissions of stockholders.*—In an action against a corporation for trespass, it is error to admit testimony as to the acts or admissions of

ADMISSIONS. *Continued.*

individual members of the corporation, unless they acted under its express authority. *Shay* v. *Tuolumne Co.*, 587

2. *Verbal admissions of a party* are to be received with caution. Such evidence is liable to much imperfection and mistake, and frequently is entitled to but little weight. *Bragg* v. *Geddes*, 624

3. *Admissions by agent incompetent to bind—Admissions, how proved.*—An agent who could not lawfully bind his principal by a contract, can not bind it by his admissions in the matter of an attempt to make such a contract. Such admissions are not part of the *res gestæ*, were not competent against the company, and did not prove the fact of receipt by it. The fact should have been proved by calling the treasurer as a witness, or by the books of the company. *Alexander* v. *Cauldwell*, 650

See AGENT; EVIDENCE, 13, 20, 21.

ADVERSE CLAIM—See ESTOPPEL, 16.

ADVERSE POSSESSION.

1. *Adverse possession with and without color of title.*—To constitute an adverse possession where there is no paper title, there must be a *pedis possessio*—an actual occupancy—a substantial inclosure; but an actual occupancy of part only will constitute an adverse possession of a whole lot, if color of title is shown to the lot. *Jackson* v. *Olitz*, 203

2. *Adverse possession by tenants in common.*—An instruction that the possession of one tenant is the possession of his co-tenants only so long as the tenant in possession recognizes the co-tenants, was properly refused, because the mere refusal to recognize the co-tenant does not constitute an adverse possession. *Colman* v. *Clements*, 247

See EJECTMENT, 4; STATUTE OF LIMITATIONS.

AGENT.

1. *Admissions of agent as to his principal's motives.*—The declarations of an agent employed to sink an oil well are not evidence of the reasons of the principal for ceasing to operate. *Karns* v. *Tanner*, 289

2. *Knowledge of corporate agent, where agent is interested.*—A principal is charged with the knowledge and bound by the acts of an agent; but this rule does not apply where, in reference to the particular subject-matter, the agent is dealing for himself with the principal. In a case where a mining superintendent sells land to his company, the company, therefore, is not chargeable with the knowledge of their agent as to the existence of an outstanding lease. *Wickersham* v. *Chicago Zinc Co.*, 537

3. *Mining superintendent—Declarations.*—The acts of a mining superintendent of a flume, in constructing, repairing and superintending the same, are binding upon the principal; but such authority does not make his acts and declarations in respect to title admissible to affect his principal. *Herbert* v. *King*, 303

4. *Authority of agent of corporation exercised in excess of the corporate powers.*—The treasurer of the "New York Mutual Coal Co.," without authority from the board of directors, made the following offer to

AGENT. *Continued.*

plaintiffs: "We wish to make an arrangement with you to furnish us coal at as low price as possible, delivered to any part of the city we may direct, you collecting the bills in the name of our company, and we paying you the difference due each month; also to deliver all coal from our mine as it arrives, and any balance left over to store in your yard; or in other words, your firm to act as delivery agents for our company;" to which plaintiffs assented, and under the agreement delivered to divers persons coal to the value of nearly $1.000. The agreement was unknown to a majority of the directors, and was in excess of the powers granted to the company in its charter. Upon suit brought against the trustees of the company for balance due for coal, *held*, that the company was not liable for the debt. *Alexander* v. *Cauldwell*, 650

5. *Liability for acts of agents, ultra vires.*—Corporations are bound only by the acts of agents done within the scope of their authority. *Id.*

See ADMISSIONS, 3.

AGRICULTURAL CLAIM.

1. *Location of farming claims in mining districts.*—The mere entry upon and possession of a given portion of the public mineral lands in California, gives no title as against the general right to enter upon the same for mining purposes; they can not be appropriated in large tracts for agricultural or grazing purposes as against the miner, although lasting or valuable improvements will be protected; and in this matter no general rule can be laid down, but each case must be decided upon its own facts. *Smith* v. *Doe*, 218

APPROPRIATION.

1. *Liberal construction.*—Notices of the appropriation of water are to be liberally construed. *Osgood* v. *El Dorado M. Co.*, 37

2. *Second notice of appropriation no abandonment of first.*—The appropriator of the water of a lake or stream, who posts a second notice of appropriation after the passage of the act of Congress of 1866, which recognized the principle of prior appropriation, does not thereby abandon his first appropriation. Such posting is an *assertion* of the claim. *Id.*

3. *Presumption of grant to first appropriator.*—In determining controversies for the possession of mining claims, water privileges and the like, the court proceeds upon the presumption of a grant from the government to the first appropriator of such mines and water privileges, and this presumption is held absolute in all such controversies. *Coryell* v. *Cain*, 227

See PATENT, 1, 2; RELATION.

APPURTENANCES—See EASEMENT, 2.

BARRIERS—See DRAINAGE, 3, 9.

COAL.

1. *The words "screened coal" construed.*—The coal in this case was in fact "screened coal" and the court applied the words of the contract to the fact of screening, and not as a technical term applying to a certain

COAL. *Continued.*
kind of coal, and *held* that defendant having screened and removed both kinds of coal, was estopped to allege that either was not screened coal. *Mercer M. Co.* v. *McKee's Adm'r*, 581
See ESTOPPEL, 14; TROVER, 1.

CONSIDERATION—See ESTOPPEL, 9.

CONTRACT.
1. *Merger of prior and contemporaneous agreements in written contracts.*—B. and S. entered into a written agreement to dissolve their real estate copartnership. *Held*, that all prior and contemporaneous agreements between them as to the terms of dissolution were merged in the written agreement. *Bragg* v. *Geddes*, 624
See EVIDENCE, 7, 24, EXECUTORS AND ADMINISTRATORS; VENDOR AND PURCHASER, 2.

CONVEYANCE.
1. *Conveyance of half interest not enlarged by sweeping clause.*—A deed of water rights conveyed "the undivided one half" of a certain ditch and flume from the Truckee river, and the granting clause was followed by "Together with" "all the water of said Truckee river which may or can be led through said ditch and flume." *Held*, that the subject-matter of the grant was an undivided half interest in the ditch, flume and water therein carried, and not *all* the water, as respondent contended. *Fogus* v. *Ward*, 1
2. *Construction of sweeping clause.—The sweeping clause* can not be construed except in context with the granting clauses. *Id.*
3. *Parol sale of claim.*—The statute of 1860 is mandatory that sale of mining claims must be in writing. *Felger* v. *Coward*, 273
4. *Possessory title conveyed by deed.*—Title by occupancy is, under the Colorado statutes, an interest in real estate, and such an interest as may be the subject of conveyance by deed. *Sears* v. *Taylor*, 318
5. *Mining claims, how transferred.*—A written conveyance is not necessary to the transfer of a mining claim. *Union M. Co.* v. *Taylor*, 324
6. *Subsequently acquired title.*—The doctrine that asserts that the subsequently acquired title of one man inures to the benefit of another, applies only where the latter is a purchaser of a title from the former, and not to a case where the title is acquired by judgment. *Meyendorf* v. *Frohner*, 559
7. *Bill of sale not under seal.*—It is no objection to the admissibility of a bill of sale of a mining claim that it is not under seal, whatever may be the effect of it, as evidence. *Jackson* v. *Feather River Co.*, 594
8. *Title transferred by delivering possession.*—Upon questions as to the occupancy of public mineral land, a transfer of the right of the occupant to the possession may as well be evidenced by agreement as by deed, *when followed by possession. Id.*
9. *Conveyance not under seal.*—Instruments conveying mining claims need not be under seal. *Draper* v. *Douglass*, 601

CONVEYANCE. *Continued.*

10. *Deed must be produced or accounted for.*—An interest in a mining claim being purchased by deed, the transfer can be shown only by production of the deed, or by proof of its loss, and secondary evidence of its contents. *King* v. *Randlett*, 605

11. *Verbal conveyances no longer valid.*—Since the act of 1860, a deed or bill of sale, accompanied by delivery of possession, is essential to pass the title of a mining claim. Prior to such act, a verbal sale accompanied by delivery of possession, was sufficient. *Id.*

12. *Assigning the deed conveys not the claim.*—An assignment of a party's right, title and interest in and to a deed does not pass the title to the mining claim therein described. It should be conveyed by deed and not by an assignment of a deed. *Id.*

13. *Certain extrinsic evidence essential to the understanding of conveyances.* Parol evidence is always admissible (1) to identify the land conveyed with the land described; and (2) to explain the latent meaning of the language used in describing it. *Reamer* v. *Nesmith*, 610

See DESCRIPTION; EJECTMENT, 42; ESTOPPEL, 2, 3, 5; EVIDENCE, 10, 11, 16, 17.

CORPORATION.

1. *Misnomer of company defendant.*—Miners associated under a company name may be sued by that name under which they transact business; but judgment can not be entered against the "Independent Tunnel Company" upon a default against the "Independent Company." *King* v. *Randlett*, 605

2. *Knowledge of charter limitations implied.*—Those who deal with corporations are chargeable with notice of the purposes for which they are formed. *Alexander* v. *Cauldwell*, 650

See ADMISSIONS, 1; AGENT, 2–5; EQUITY, 8, 9; EXECUTORS AND ADMINISTRATORS, 4; PARTIES; STOCK.

DESCRIPTION.

1. *Sufficient certainty in description.*—Where the description in the writ of ejectment was for a certain limestone quarry, containing about three acres, and bounded on two sides by adjoiners, a verdict for the quarry, describing the two boundaries, would have been sufficiently certain. *Clement* v. *Youngman*, 231

See DOWER, 8; EJECTMENT, 2.

DIP.

1. *Adjoining owners.*—Adjoining owners on the same level of the same vein, owe no special duty to each other. *Philadelphia & Reading Coal Co.* v. *Taylor*, 133

2. *Purchased easement can not be drowned out.*—When, however, the owner of the superjacent land has created a servitude upon his land in favor of the subjacent owner, such as a right to drive an air-way through his works and to connect with the surface, such owner, after he has worked all his coal out and is about to abandon his workings, must give reasonable notice of this to the owner of the dominant tenement, and on

DIP. *Continued.*

failure so to do, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement—the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied. *Id.*

See DRAINAGE; MINES.

DISCOVERY—See ESTOPPEL, 17; LOCATION.

DISTRICT RULES.

1. *Parol evidence of district rules.*—Parol evidence of mining customs can not be received when there are written rules in force on the same subject. *Ralston* v. *Plowman*, 160

2. *Legality of mining customs a question for the court.*—It is error to allow a jury to pass upon a question of law; and whether or not mining customs are contrary to law is such a question, and should have been determined by the court. *Id.*

3. *Custom at variance with general law.*—The rights of a party to a mining claim which are fixed by the general law of the land can not be divested by any mere neighborhood custom or regulation. *Waring* v. *Crow*, 205

4. *Customs proved though not pleaded.*—In a suit in ejectment for a mining claim, proof of the mining rules and customs which tends to support the plaintiff's title may be given in evidence though such rules and customs are not pleaded. *Colman* v. *Clements*, 247

5. *Parol and written proof of mining rules.*—A motion to strike out parol proof of mining customs was properly refused when it appeared that the written rules afterward proved were of doubtful force at the time they were sought to be applied to the facts of the case. There was no impropriety in leaving both the parol and written evidence to the jury. *Id.*

6. *Mining rule construed—Forfeiture.*—The word "claim" in the following mining rule—"There shall be one day's work done on each claim every thirty days from the first of May until the first of December in each year," construed to include all kinds of claims, joint as well as separate, and the rule applied, that parties claiming forfeiture under the law must show that the case comes within the strict letter of the rule. *Id.*

See ABANDONMENT, 3; TAILINGS, 3.

DITCH.

1. *Relation of upper and lower sections of ditch—Consistent decisions on same matter.*—The Supreme Court of the United States having held, as to a certain water ditch or canal several miles in length, that different parcels of it are separate structures, the Supreme Court of California are compelled to hold as to the same property, that there having been a sale of the lower section separate from the upper section, "there is no legal duty upon the part of the owner of the upper section to permit" the water brought by the upper section to flow into the lower section, and there was error in allowing the value of the waters to be considered in fixing the value of the lower section. *Reynolds* v. *Hosmer*, 6

2. *Construction of United States mining acts—No right of way without*

DITCH. *Continued.*

damages.—The mining acts of Congress of 1866, 1870 and 1872 (Rev. Stats., §§ 2318–2342) do not grant to the owner of ditches on the public lands any right not "recognized and acknowledged by the local customs, laws and the decisions of the courts;" they do not authorize the construction of a ditch across the mining claim of another, where such mining claim was located prior to the ditch. *Titcomb* v. *Kirk*, 10

3. *Ditch across lands of both parties for mutual accommodation—Executed parol license.*—Plaintiffs and defendants constructed a ditch from the tail-race of the Nevada Land and Mining Company, across the lands of the defendants and plaintiffs respectively, for their joint use in the conveyance of such quantity of water as each of them might purchase from the said company; the defendants diverted the water and deprived plaintiffs of its use. *Held*, that these facts established an executed parol license in favor of the plaintiffs, which supplied the place of a writing and took the case out of the Statute of Frauds, and entitled them to an interest in said ditch and to damages for the diversion of the water. *Gooch* v. *Sullivan*, 15

See PATENT, 1, 2.

DOWER.

1. *Dower in open mines.*—Dower is due out of mines wrought during coverture, whether by the husband or by lessees, and whether he own the whole land or only the minerals. *Stoughton* v. *Leigh*, 47

2. *In unopened mines.*—But dower is not due out of unopened mines. *Id.*

3. *Work for sole use.*—Dowager may work any open mine on land assigned to her, for her own benefit. *Id.*

4. *How assigned.*—Dower may be assigned of mines, either separately or collectively with other lands, by metes and bounds if practicable, otherwise by a proportion of the profits, in sundry ways. *Id.*

5. *Excessive dower.*—The heir of full age assigning excessive dower has no relief; otherwise as to the act of an infant, or dower assigned by the sheriff. *Id.*

6. *Dower due of all open mines.*—Dower is due of all mines wrought during coverture, but not of mines unopened at the death of the husband. *Coates* v. *Cheever*, 55

7. *Various methods of allotting dower.*—When a division by metes and bounds is practicable it should be made; otherwise dower may be assigned by allowing an alternate occupancy of the whole, or a share of the profits. *Id.*

8. *Defines of quarry not limited to ground actually broken.*—A husband died seized of land, about four acres in extent, consisting of a slate quarry. Only a small fraction, about one quarter of an acre, had been dug into, but the practice was to take a section ten or twelve feet square on surface, go down to a certain depth and then start a new section from surface. *Held*, that the entire tract was to be considered as an open quarry, and that the widow was dowable of the whole. *Billings* v. *Taylor*, 65

9. *Dower at common law.*—The general doctrine is that the widow is

DOWER. *Continued.*

dowable of mines open or worked during coverture, but not in deposits not opened at all; as to mines once opened, she is not confined to the old approaches. *Lenfers* v. *Henke*, 67

10. *Dower in mines opened after coverture but before assignment.*—No distinction can be perceived between mines open during coverture and mines opened by the heir before the widow's assignment of dower, and as to such latter, *held*, that she is entitled to dower therein the same as if opened during her husband's lifetime. *Id.*

11. *Agreement between heir and dowager who is also co-tenant.*—Where a widow, seized in her own right of a one third interest in lands and claiming dower out of the other two thirds, of which her husband had died seized, made an agreement with the heir (of such two thirds) by which each was to receive one half of the profits of mines. *Held*, that such contract may be treated as an assignment of dower as to such two thirds interest. *Id.*

12. *Statute of Frauds.*—Dower is not created but only ascertained by an assignment or admeasurement thereof, and therefore if assigned by parol, the contract is not within the Statute of Frauds. *Id.*

13. *Contract amounting to assignment of dower.*—Contract between the heir of full age and dowager, giving her a portion of the rents or profits, if fairly made, will bind the heir and all privies in estate. *Id.*

14. *Dower in royalties.*—A widow is entitled to dower out of mines opened in her husband's lifetime, and to her proper share of the royalties accruing out of mines which her husband had demised in his lifetime. *Hendrix* v. *McBeth*, 74

15. *Working mines opened by heir.*—It is not waste for widow to work mines opened by her husband, nor by *the heir before assignment of dower.* *Lenfers* v. *Henke*, 68

DRAINAGE.

1. *Responsibility from tampering with natural course of stream.*—Where the mine owner for his own convenience diverts the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability. *Fletcher* v. *Smith*, 78

2. *Circumstances* which will create liability in such a case. *Id.*

3. *Working across boundaries on the dip into lower mine.*—The owner of a coal mine excavated to his boundary as he had the right to do, but continued the excavation wrongfully beyond the boundary into the neighboring mine, leaving an aperture in the coal of that mine through which the water passed. *Held*, that the defendant was liable for the original trespass in breaking into the mine, but not in an action on the case for *omitting to close up the aperture*, although a continuing damage resulted from its being unclosed. If it was defendant's duty to close it,

DRAINAGE. *Continued.*

and an action lies for omitting to close it, the declaration should allege the duty specifically; plaintiff can not recover on a count stating merely that the defendant made the aperture and omitted to close it. *Clegg* v. *Dearden*, 88

4. *Such loss is damnum absque injuria.*—A mine owner may not negligently nor maliciously (in violation of the maxim *sic utere tuo*) divert even an unknown subterranean stream, but he may drain, mine or quarry in the course of enjoyment of his own land, though in so doing he interfere with the flowage of water in hidden, unknown, underground channels. *Haldeman* v. *Bruckhart*, 108

5. *Spring drained by mine.*—A mine owner who in due course of mining taps and drains the underground channels supplying a spring upon adjoining land, without malice or negligence, gives no right of action to the party whose spring is thus destroyed. *Id.*

6. *Anticipated pollution from mine drainage not to be enjoined.*—The drainage from the mines of defendant, and the accumulations of coal dust at their mines, it was alleged, would pollute the water used by complainant to supply certain towns. The works of defendant had been erected at great expense, and it did not clearly appear that any material pollution had actually occurred to the water at the time of the hearing. *Held*, that the injunction should have been refused. *New Boston Co.* v. *Pottsville Co.*, 118

7. *Upper mine must drain to surface if practicable.*—The owner of the upper colliery can not wantonly allow his water to flow into the lower mine if he can by the use of reasonable diligence control its flow and carry it to surface. The maxim *sic utere tuo ut alienum non lædas* controls in such cases as it does in cases where the surface and the minerals have been severed. *Locust Mt. Co.* v. *Gorrell*, 129

8. *Upper and lower mines on the dip.*—Where there are two mining operations—one owner working on the upper level and one on the lower level of the same vein—the owner of the upper level, operating in the most approved method and with care, is not required to control the natural flow of the water downward, and may work his coal out down to his line; and the maxim of the common law, *sic utere tuo ut alienum non lædas*, applies. *Philadelphia Coal Co.* v. *Taylor*, 133

9. *Barriers.*—And the owner of the subjacent level owns a servitude, and must leave a pillar of coal to support the gangway and keep out the water from the level above. *Id.*

10. *Statutory bounty on drainage.*—The statute of Iowa allowing to all persons providing drainage for lead mines a royalty of one tenth of all the mineral extracted from the mines benefited, *held* constitutional. *Ahren* v. *Dubuque M. Co.*, 144

11. *Principle involved in its construction.*—The principle involved is the same as in cases of party walls and partition fences, and merely provides compensation for benefits received which ought, *ex æquo et bono*, to be paid for. *Id.*

12. *Abstract right to use of watercourse—Compelling stream to carry foreign water.*—The rights of a riparian owner are not confined to the

DRAINAGE. . *Continued.*

stream as it flows in a state of nature nor to the mere natural drainage; he may confine, control and accellerate the flow, or increase the volume of water which reaches the stream in the reasonable use of his premises, without liability to the lower proprietor. *McCormick* v. *Horan*, 154

13. *Application of the rule to pumping from quarry—Injunction to prevent obstruction of stream.*—Plaintiffs owned a quarry on land on which rose a small stream. The water collected in the quarry pits, and when the quarry was worked it was pumped into the stream bed and flowed off the same, to a practical extent, as it would have done at first had there been no quarry there. Defendant obstructed the stream so as to throw it back on plaintiff's land. *Held*, that an injunction would lie to prevent further obstructions and to compel the removal of the obstructions already placed. *Id.*

14. *Continuing injury after former recovery.*—If damages have been awarded on a former proceeding against the defendant for making the aperture and letting in the water, the plaintiff can have no further recovery for damages resulting from the defendants neglecting to close the opening since the original award. *Clegg* v. *Dearden*, 89

See DIP.

DUMP.

1. *No right to dump on another's ground.*—In the absence of local custom allowing it, no person can run his tail race or sluicing flume over the claim or dumping ground of a stranger, and no damages can be recovered against a party for filling up such flume by tailings deposited on his own ground. *Ralston* v. *Plowman*, 160

See TAILINGS.

EASEMENT.

1. *Entry, to enforce easement.*—A party having an easement on the land of another, may go upon the land for the purpose of the enjoyment of such easement to its fullest extent, either to construct or repair, or secure it from danger—doing as little damage as possible, and responsible for that damage—for the grant of a privilege carries with it everything necessary to its enjoyment. *Philadelphia Coal Co.* v. *Taylor*, 134

2. *Appurtenances—Right to mine in adjoining land.*—F., seized in fee of a tract of land, sold and conveyed a small part of it to B., in fee, and, by the same instrument, did grant an easement or right to B., "from time to time, and at all times hereafter to dig, take and carry away all iron ore to be found within the bounds of" the residue of the tract not conveyed; "provided the said B., his heirs and assigns, pay to the said F., his heirs and assigns, the sum of six pence per ton for every ton taken from the premises." *Held*, that such easement or right is not appurtenant to the part of the land conveyed, so that it would pass by a sheriff's sale of the latter. *Grubb* v. *Guilford*, 163

3. *Easement defined.*—An easement is "a liberty, privilege or advantage which one may have in the lands of another, without profit." *Big Mountain Improvement Co.'s Appeal*, 178

EASEMENT. *Continued.*

4. *Ejectment will not lie for an easement.*—The devise as to the coal was a mere privilege and easement, an incorporeal hereditament, and ejectment is not the remedy for an interruption of the right. *Carnahan* v. *Brown*, 193

See DIP, 2; LICENSE; SURFACE.

EJECTMENT.

1. *An ejectment will lie for a coal mine.—Comyn* v. *Kyneto*, 198

2. *Pleading—Description* —A declaration in ejectment for mines (*de mineris carbonum*) is good without showing the number of mines, such description being well understood in the venue where laid. *Whittingham* v. *Andrews*, 198

3. *Title necessary to maintain ejectment.*—Possession for many years of a lead mine under a deed declaratory of a beneficial interest, in which a covenant to convey the legal estate is inserted, will not raise a presumption that such estate has been conveyed to the possessors, nor entitle them to bring an ejectment, which can only be supported by the legal title. *Goodright* v. *Swymmer*, 200

4. *Adverse possession—Quarrying stone.*—Quarrying stone from time to time during a period of twenty-five years on an uninclosed tract of fifty acres of wild land, with claim of title by deed during that time, *held*, a sufficient adverse possession to maintain a recovery in ejectment against one who, holding the true title, enters upon the premises. *Jackson* v. *Olitz*, 202

5. *Parties.*—In ejectment for an undivided fourth of a mining claim, it is unnecessary to make the owners of the other three fourths parties defendant; the only necessary party defendant is the one who does the plaintiff wrong. *Waring* v. *Crow*, 204

6. *Insufficient denial in ejectment—Admission by failure to fully deny.*—An answer which denies that this defendant has "unlawfully, wrongfully and in violation of plaintiffs' rights, had the possession," etc., does not thereby put in issue the fact of possession, but merely the character of it, and the allegation of possession being material, a failure to deny is an admission of it. *Burke* v. *Table Mt. Co.*, 209

7. *Admission of ouster.*—An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants *wrongfully* and *unlawfully* entered and dispossessed" plaintiff, because such denial admits entry and ouster. *Busenius* v. *Coffee*, 214

8. *Instructions in ejectment.*—Where in such case the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title. *Id.*

9. *Constructive denial of possession.*—In an action to recover mining ground, the general allegation of plaintiff that he is in possession of a large tract of land for mining and agricultural purposes, no specific occupa-

EJECTMENT. *Continued.*

tion of the particular portion of the ground in controversy nor the character of plaintiff's possession being shown although such allegation of possession be not denied in terms, yet it is sufficiently denied by an answer, which avers that the defendant entered upon the land for mining purposes as a part of the public domain. *Smith* v. *Doe*, 218

10. *Miner no trespasser—Statutory presumption as to public lands.*—A party entering upon mineral land for the purpose of mining can not be presumed to be a trespasser; for if the land be not private property he has the right to enter upon it for such purpose, and until it is shown that the title has passed from the government, the statutory presumption that it is public land applies. *Id.*

11. *Plaintiff must recover upon title averred.*—In ejectment for a mining claim, where plaintiff, in his complaint, avers the facts upon which his title is based, he must be held on the trial to the title alleged, and defendant may well claim surprise if another and different title is allowed to be proved; and such surprise will be good ground for a motion for new trial. *Eagan* v. *Delaney*, 223

12. *Where facts constituting the title* are averred, they must be proved as laid. *Id.*

13. *Form of complaint in ejectment.*—In ejectment for a mining claim it is only necessary to allege in the complaint, that on some day designated the plaintiffs were possessed of the land, describing it; that whilst thus possessed, the defendant entered upon the same and ous ed them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster. *Coryell* v. *Cain*, 226

14. *Mesne conveyances not to be pleaded.*—It is unnecessary to set forth the transfers by which plaintiffs derive title, and such matters will be stricken out on motion. *Id.*

15. *Pre-emption claimant may show other title.*—The designation by the plaintiffs in their complaint of the property in controversy as part of a pre-emption claim does not preclude them from relying on any other source of title than the United States or the State. *Id.*

16. *Rule as to title in third party modified.*—The general rule that the claimant in ejectment must recover upon the strength of his own title has, from the anomalous condition of things arising from the peculiar character of the mining and landed interests of California, been to a certain extent qualified and limited. *Id.*

17. *Tenant in common may recover against trespasser.*—A tenant in common of a mining claim is entitled to recover in ejectment against mere trespassers, even though there is a misjoinder of parties plaintiff, if defendants do not take advantage of such misjoinder by demurrer or answer. *Rowe* v. *Bacigalluppi*, 237

18. *Pleading—Double defense.*—In an action of ejectment for a mining claim, the complaint, which was verified, alleged title and possession in the plaintiffs on a certain day; the defendants, by answer, also verified, denied: 1. The title and possession of the plaintiffs on the day named. or at any time; and averred, 2. That if the plaintiffs ever had title they

EJECTMENT. *Continued.*

had abandoned and forfeited it. *Held*, that the defendants had the right to set up both defenses in their answer, and to support both by proof, and that it was error to compel them to elect on which defense to rely. *Bell* v. *Brown*, 240

19. *Inconsistent and contradictory defenses—Perjury.*—The Practice Act of California allows a party to set up as many defenses as he may have, and this rule is as old as the common law; but one who verifies an answer which contains a direct averment and also a direct denial of the same fact, is guilty of perjury. The inconsistent defenses which he is allowed to plead are those which are not directly contradictory, but only so by implication of law, *e. g.*, set-off, discharge in bankruptcy, the Statute of Limitations, etc. *Id.*

20. *Parties.*—In a suit in ejectment for a fraction of a mining claim, by some of the original locators against the others who have joined with strangers in relocating the claim, it is not necessary that all of the relocators should be made parties to the suit. *Colman* v. *Clements*, 247

21. *The complaint in ejectment* should not state the evidence, but only the ultimate facts constituting the cause of action. *Depuy* v. *Williams*, 251

22. *Ouster—Force—Fraud.*—If a party had the right of entry upon a mining claim, his right is not vitiated by his forcible or fraudulent exercise of such right, and the party whom he ousted can not be restored by ejectment. *Id.*

23. *Practice—Defendant substituted for plaintiff.*—If one of several defendants in a suit in ejectment buy the plaintiff 's claim, the controversy as to such defendant is ended, and he may properly be substituted for the plaintiff in prosecuting the suit against the remaining defendants. *Bullion M. Co.* v. *Crœsus M. Co.*, 255

24. *Amendment to complaint.*—In such a case the new plaintiff can not so amend his complaint as to include other property than that originally sued for, and which he claimed by a different title. *Id.*

25. *Statute of Limitations as a defense to the amendment.*—The fact that the right of action for such additional ground has been barred by the Statute of Limitations since the commencement of the original suit, is a further reason for refusing to allow such amendment. It would mix up two causes of action and embarrass the defense. *Id.*

26. *Judgment for undivided fraction of claim—Duty of sheriff.*—Where one of several tenants in common sues in ejectment for an undivided fraction of a claim and recovers, the law does not authorize the sheriff in entirely expelling the defendants from possession if they are willing to quietly submit to a joint occupancy by the plaintiff with themselves. *Id.*

27. *Tenants in common may sue jointly.*—All the tenants in common of an estate may unite in one action, under the California statute, for the possession of the common property, or one tenant may sue for his undivided fraction, but it has never been decided that more than one and less than all can unite in such action. *Id.*

28. *Recovery of blind lode without surface.*—Where suit is brought

EJECTMENT. *Continued.*

for a blind lode bounded by walls not found till the depth of about two hundred feet is reached, the lode or ledge only can be recovered, and no part of the surface. *Id.*

29. *Recovery of lode without its hoisting works—Severance.*—The fact that plaintiff recovered a vein or lode gives him no right to hoisting works erected for the purpose of taking ore from that vein, unless he had also recovered the surface on which such hoisting works were erected. *Id.*

30. *Necessity of demand in ejectment against co-tenant.*—In ejectment by one tenant in common against his co-tenant for an undivided interest in a mine, the plaintiff introduced evidence of his title and rested without any proof of a demand to be let into the possession, and the court thereupon directed the jury to return a verdict for the defendant. *Held*, correct, because plaintiff had not made out a *prima facie* case when he rested. *Hebrard* v. *Jefferson M. Co.*, 270

31. *Vendee under executory contract can not recover in ejectment—Specific performance.*—C. agreed, in writing, to convey to F. an interest in a certain mining claim, upon payment by F. of the purchase price. F. performed his part of the agreement, and also worked in the mine for wages, receiving in addition thereto a share of the dividends proportionate to the interest which C. had agreed to convey to him. Afterward C. refused to make the conveyance, and F. brought ejectment for the possession of an undivided eighth interest. *Held*, that as F. showed only a contract to convey, his remedy should have been for a specific performance, and, as incidental thereto, delivery of the possession. *Felger* v. *Coward*, 273

32. *Ejectment by licensor of oil land.*—Rynd granted to Watson the exclusive right of digging for oil on a certain farm, reserving the right to farm the surface. If the boring proved profitable, the writing was to be construed as a perpetual lease; if otherwise, possession was to revert to Rynd. On part of the farm the boring had been profitable. Rynd, alleging that the boring had not been profitable on another part of the farm, brought ejectment for that part. *Held*, that ejectment would not lie to test Rynd's right to bore for oil. *Rynd* v. *Rynd Farm Oil Co.*, 275

33. *Idem—When a proper remedy.*—Ejectment under the agreement would lie if Watson had occupied the land for other purposes, or to an extent greater than allowed by the contract, or, if the license was revocable, or had been forfeited by Watson. *Id.*

34. *Ejectment will lie by the lessee of an oil well* who has been ousted, possession being essential to enjoyment of the lease, even if the right conferred by the lease was but an incorporeal hereditament. *Karns* v. *Tanner*, 289

35. *A corporation holding an agreement for a deed can not maintain ejectment.*—An agreement in writing by the owners of mining ground to incorporate and convey their several interests to the company, in pursuance of which the corporation is formed, will not vest the title in the company so as to enable it to bring ejectment for a portion of the ground, the title to which stands in the name of an incorporator, who dies before

EJECTMENT. *Continued.*

executing a conveyance to the company. *San Felipe M. Co.* v. *Belshaw*, 315

36. *Pleadings—Sufficient averments.*—A general averment in a declaration, that the plaintiff, on a day specified, was in possession of the premises in question, and that afterward, on a day specified, the defendant entered thereon and unlawfully withholds possession from the plaintiff, sets out a sufficient cause of action. *Sears* v. *Taylor*, 318

37. *Character of title declared on immaterial.*—In an action against a mere intruder, whose entry is without right or title, the character of the title declared on, whether in fee, or by virtue of local mining laws, or a right of possession generally, is immaterial. *Id.*

38. *Ejectment is a possessory action*, and to maintain it the defendant must be in possession, actual or constructive, at the time of suit brought; and the plaintiff may recover upon proof of prior possession without other title. *Id.*

39. *Facts which may be proved.*—Under an averment of the plaintiff's ownership in fee and right to possession, at the date of the commencement of the suit, he may prove any facts which would entitle him to possession at that time. *Id.*

40. *Priority of title or possession.*—The plaintiff need not go back in his title further than to antedate that of the defendant. *Id.*

41. *Defendant may prove title under the general issue—Demurrer does not admit surplusage.*—The defendant may, under the general denial, give in evidence title in himself; the allegation of such title in the answer does not constitute new matter nor present a new issue, but is only surplusage, and is hence not admitted by a demurrer to the answer. *Myendorf* v. *Frohner*, 561

42. *Void deeds based on title obtained by trespass.*—From the plaintiff's testimony, it appeared that he and two others had taken possession of his employers' mining claim during their temporary absence—a clear attempt to "jump" the ground—and after locating the same, the two others had conveyed to plaintiff. In ejectment for the claim, *held*, that the court properly refused to admit these conveyances as evidence of plaintiff's title. *Murphy* v. *Cobb*, 330

43. *Necessary proof.*—In ejectment the plaintiff must prove, first, title in himself, or the right to the immediate possession at the time of instituting the suit, and second, that possession was unlawfully withheld by defendant at the time. *Herbert* v. *King*, 303

See ADVERSE POSSESSION; EASEMENT, 3; STAT. LIM.; VERDICT.

EMINENT DOMAIN.

1. *Damages reduced because of improved facilities for transit.*—Where compensation is claimed for the location and construction of a railroad between coal mines and a navigable river on the land owner's premises, whereby the conveniences of the river transportation for the coal to market were injured, or cut off, it is competent for the railroad company to show that the river transporation, in connection with the coal banks, had ceased to be valuable, or become of less value by means of the facilities

EMINENT DOMAIN. *Continued.*

for coal transportation afforded by the railroad, for the purpose of reducing the damages. *Cleveland & P. R. R. Co.* v. *Ball*, 333

2. *Measure of damages—Absolute and relative value.*—Where a piece or strip of land is, by appropriation made by a railroad company, severed from its connection with the other land of the owner, in estimating the compensation to be made to the owner, not only is the abstract value of the strip or piece taken to be considered, but also its relative value and the effect arising from its severance from the residue of the owner's land, as well as the uses to which it is to be appropriated. *Id.*

3. *Damage to residue—Betterments.*—In case of a railroad appropriation of the right of way through a tract of land causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue can not be taken into account in estimating the amount of compensation to be paid to the owner, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. *Id.*

4. *Collateral attack.*—Judgment of condemnation can not be questioned in a collateral proceeding. *Evans* v. *Haefner*, 344

5. *Tender of condemnation money.*—After money has been paid into court, by order of court, and tendered to the attorney of the party whose land has been condemned, who refuses to take it, the railroad company may lawfully enter upon such land protected by the order of court. *Id.*

6. *Property in the minerals.*—Minerals found below the bed of the road and whose excavation is not necessary for the construction of it, remain with the owner of the soil; but as to the portion removed in order to build the road, the owner of the soil (the party whose lands have been condemned) can not claim them. *Id.*

7. *Measure of damages—Unopened mines.*—In estimating the damages that will be sustained by the construction of a railroad through the property of a land owner, the jury may allow the party the market value of the land taken, and all actual damages arising from the manner in which the road passes through the property and affects the improvements, but they are not at liberty to estimate the value of unopened mines, as mines, or to estimate that there is a certain value in coal under the surface, and so raise the *quantum* of damages above the present salable value of the tract condemned. *Searle* v. *Lackawanna & B. R. R. Co.*, 353

8. *Future inconvenience.*—Nor is it a subject of damages that the owner, when he begins to open his mines, will find the road-bed an obstruction. *Id.*

9. *Idem—Condemnation of way over coal lands—Title to coal.*—Where there are unopened coal veins on a tract of land over which a railroad is condemned, the case may be treated as one of wild lands, and the further inconvenience to opening the mines from the grade of the road-bed, etc., can not be considered. As to the minerals themselves, the railroad

EMINENT DOMAIN. *Continued.*

"gets no title to the coal further than it is needed to support the surface." *Id.*

10. *Ulterior damage from railway by seepage from road-bed into mines.*—A railway company in constructing its road-bed cut the soil down till they reached a porous stratum of rock; through this rock water penetrated into plaintiffs' mines; the railroad were required by their act of Parliament to make and maintain sufficient drains; they had also the option under their act to purchase the mines; at time the road was built the mines were not worked within forty yards of the bed; the company had declined to exercise their option to purchase. The mines were damaged by the percolation through the porous soil and the want of sufficient drains. *Held*, that the damages were not covered by the original compensation money. *Bagnall* v. *London & Northwestern R'y Co.*, 362

11. *Unforeseen damage from railroad construction and operation.*—Damage to mines caused by the construction of a railroad, of such nature that they could not be foreseen at the time of the laying out of the road, and *a fortiori* damages from negligence in the care and management of the line, are not included in the compensation clauses of the railway acts, and the company is liable, therefore, upon action brought. *Id.*, 366

12. *Option to purchase.*—When a railroad company decline to purchase mines under a statutory option, they must leave the mines intact. *Id.*

13. *Underground right of way.*—The owner of a stratum of coal is an owner of land; and an underground right of way through his vein may be condemned. *Brown* v. *Corey*, 368

14. *Lateral railroads—Private contracts.*—An entry on land of another to build a lateral railroad, connecting mines with highways, is an entry under the State in its exercise of the right of eminent domain, in pursuance of public law, and all private contracts are subordinate thereto. *Id.*

15. *Measure of damages.*—Upon the condemnation of a tract of coal severed from the surface, the measure of damages is the injury done to the whole tract, or the difference between its value at the time of the entry and its value after the completion of the road; and the inconvenience to the future working of that part of the tract not taken is to be considered. *Id.*

16. *Right of way.*—The Lateral Railway Act of May 5, 1832, is intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the land of another. *Lyon* v. *Gormley*, 383

17. *Fee not divested.*—The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood or mineral. The act fastens on his land a servitude, but does not disturb any right not essential to the servitude. *Id.*

18. *Materials exsected.*—The petitioner does not acquire the ownership of materials he may displace, or any more than the right of way and the right to use those materials in the construction of his way. *Id.*

19. *Pipe line.*—A pipe line for the transportation of petroleum with rates of toll fixed by its act of incorporation is a "highway" and an "in-

EMINENT DOMAIN. *Continued.*

ternal improvement," and as such entitled to exercise the right of eminent domain. *West Virginia Co.* v. *Volcanic Co.*, 389

20. *Preliminary attempt to agree.*—An offer and refusal at the local office of a corporation when its president and directors reside out of the State is a sufficient attempt to "agree" under the statute. The condemning company was not bound to go out of the State to make the offer. *Id.*

21. *Underground railroad not of public utility.*—A company owning coal lands petitioned for the condemnation of an underground right of way (tunnel) from their coal lands. The commissioners' report and the evidence showed that the company owned about thirty acres of coal which could not be mined and transported without going through the land sought to be condemned; that the company used the coal for manufacturing salt and also to sell; but that it was not the only supply of those who bought from them, and that the underground railroad would not be used by the public. *Held*, no case of "public utility" within the meaning of the Statute of Eminent Domain. *Valley City Salt Co.* v. *Brown*, 397

22. *Essentials of a case for the exercise of eminent domain.*—There should be (1) a clear public use; (2) a controlling power retained by the government over the condemning party, and (3) extreme difficulty in effectuating the purpose in any other way. The combination of these three elements is perhaps as close an approximation as can be made, to a rule or test in such cases. *Id.*

23. *Condemning way under pretense of public use.*—The owner of coal mines can not, for the benefit of the mines, organize a railroad corporation and condemn land under the general railroad laws, nor otherwise than by strict compliance with the lateral railroad laws. Such a railroad is not for public use within the meaning of the acts of April 4, 1868, and April 28, 1871. *Edgewood Railroad Co.'s Appeal*, 406

24. *Power, when exercised.*—The power of eminent domain is conferred on citizens only when some existing public need is to be supplied, or some present public advantage to be gained, but not with a view to contingent results, dependent upon the success of a projected speculation. *Id.*

25. *Condemnation of land for benefit of mines.*—The act of the legislature of Nevada entitled "An act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada," allowing, among other things, the condemnation of land for the purpose of transporting timber necessary to work a mine, is constitutional. *Dayton M. Co.* v. *Seawell*, 424

26. *Necessity and public advantage must combine.*—Private property can not be taken for private use, nor is the fact that its use will be for the advantage or benefit of the public a sufficient ground for taking it; there must be combined with the public advantage a necessity for the exercise of the right of eminent domain. *Id.*

27. *Legislative construction should prevail in case of doubt.*—While the declarations of the legislature that "mining, milling, etc., are for the public use, and the right of eminent domain may be exercised therefor" are not conclusive upon the courts, yet it is only when the legis-

EMINENT DOMAIN. *Continued.*

lature has passed beyond the limits of its constitutional power that courts are authorized to interfere, and in cases of doubt the construction given to the constitution by the legislature ought to prevail. *Id.*

28. *Definition of public use.*—Any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use. *Id.*

29. *Condemnation for flumes and tunnels not of public use.*—Subdivision 5 of Sec. 1238 of the Code of Civil Procedure, authorizing the exercise of the right of eminent domain to condemn land for tunnels, flumes, ditches, dumps, etc., for working mines, and declaring them to be public uses, is unconstitutional and void. *Channel Co.* v. *Cent. Pac. Co.*, 438

30. *Legislative assertions void when in contradiction of facts.*—The courts are not bound by the declarations of a legislature that a certain business is a public use, when it is manifestly of a private nature. *Id.*

EQUITY.

1. *Equitable jurisdiction.*—Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. And it is the only court for relief where the relief must consist in annulment. *Jones* v. *Bolles*, 445

2. *Proof of complainant's interest in the issue.*—Complainant having averred an interest in the stock, and acts of defendant tending to depreciate its value, the averment of the amount of interest not being denied, but only ignorance of the fact by defendant stated—and the proof showing his purchase—there is sufficient averment and proof of complainant's interest. *Id.*

3. *Practice in U. S. courts, how regulated—Mandatory injunction.*—The jurisdiction and practice in equity of Circuit Courts of the U. S. is regulated by acts of Congress and the rules of the Supreme Court, and is not affected by State legislation. The statute authorizing courts of equity to restore possession where parties have been ousted by force is therefore inoperative upon the federal courts. *Stevens* v. *Williams*, 449

4. *Account not allowed on bill for injunction.*—On bill filed by the assignees of lessees of salt works to enjoin part owners of it from disturbing their possession, the only issue is the right to an injunction and an account of profits can not be decreed. *Stuart* v. *White*, 454

5. *Practice, where cases joined.*—But there being another case in the same court between the owners of the property, in which the court had taken possession of the property and rented it out, and both cases having been heard together, the order to account may be made in both cases. *Id.*

6. *Practice—Remedy at law.*—A motion to dismiss a bill in equity because the remedy at law is complete, comes too late if made for the first time at the trial term. *Belle Greene M. Co.* v. *Tuggle*, 465

7. *Equity will restrain acts amounting to breach of trust.*—Courts of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts, even within the scope of the corporate authority, if such acts when done would amount to a breach of trust. *Burke* v. *Flood*, 469

EQUITY. *Continued.*

8. *Stockholders' suit—Necessary allegations.*—A stockholder who brings a suit on his own behalf and on that of the other stockholders, to vindicate the rights of the corporation and for an accounting must not only state the grievances which call for this kind of relief, but show to the court that he has exhausted all the means within his reach to obtain redress within the corporation itself, or by the stockholders as a body. *Dannmeyer* v. *Coleman*, 474

9. *Idem—Bona fide interest essential.*—He must show that he has made such an effort himself, and not that another has; that he was a stockholder at the time of the transaction of which he complains, or that the stock has devolved on him not by purchase, but by operation of law; and that the suit is not a collusive one to confer jurisdiction on the federal court; and the bill must be verified. *Id.*

See WITNESS, 4.

ERROR.

1. *Error is prima facie injury.*—Every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party to show clearly that no hurt was done by the error. *Jackson* v. *Feather River Co.*, 594

2. *Erroneous instructions as ground for reversal.*—If a case is submitted to a jury upon instructions, some of which are erroneous, it is sufficient ground for reversal that the jury might have been influenced by such erroneous instructions, though the evidence may have been sufficient to sustain the verdict independent of the instructions. *Kelly* v. *Taylor*, 559

ESTOPPEL.

1. *Equitable estoppel defectively pleaded—Waiver.*—In a suit for the diversion of water the answer set up that the right of the plaintiffs' grantors to the water was under an oral license from the defendants, which was subject to their right to use the water at all times. The replication alleged that defendants were estopped from setting up any such agreement because they were present at the time of the plaintiffs' purchase, and failed to notify them of such agreement. *Held*, that the replication fails to set forth all the facts which constitute an equitable estoppel, for it does not appear therefrom that the plaintiffs have been injured by any intended deception or fraud of defendants, but also, *held*, that the defendants had waived the defect in pleading by failure to except to the replication, and by allowing evidence to be produced on the trial the same as though the estoppel had been properly pleaded. *Fabian* v. *Collins*, 21

2. *Draftsman of deed estopped from claiming title to the premises conveyed.*—Plaintiffs purchased certain water rights of parties whose claims were in conflict with defendants', but one of the defendants drew the deed and witnessed it, and the other was present and knew that the sale was going on. Neither of them asserted any claim to the water. *Held*, that they were estopped from afterward asserting any claim to the same adverse to the plaintiffs. *Id.*

3. *Parol contract for exchange of land.*—A parol contract for the exchange of land is not complete when it wants certainty, and possession

ESTOPPEL. *Continued.*

has not been taken under and pursuant to it; but if a party enter upon land in consequence of a parol promise of the owner to exchange for other land, and make improvements with the knowledge of the owner, the latter, although not bound in law for want of writings, yet is in conscience, so far as to preclude him from taking advantage of the want of a contract. *Big Mountain Improvement Co.'s Appeal,* 178

4. *Injunction against disturbance by estopped owner—Ejectment, not equivalent to equitable relief.*—A party by whose encouragement expenditures have been made, to such an extent as to be incapable of re-imbursement except by enjoyment, will be enjoined from disturbing the possession; he is estopped because he would wrong the party by withdrawing his consent. When the complainant has such a right, and the defendant is thus estopped, the defendant may be enjoined from prosecuting an ejectment for the premises; and the fact that complainant would have a defense to the ejectment is no bar to relief in equity, because ejectment would not affirmatively assert the complainant's right short of three verdicts. *Id.*

5. *Sale by stranger—Silence of co-tenant.*—The mere passive acquiescence by a tenant in common in the sale of his co-tenant's interest by a party having no title, can not confer any title upon the vendee. *Waring* v. *Crow,* 205

6. *Former recovery in trespass.*—In trespass *quare clausum fregit* for entering plaintiff's close, digging and taking away coal, defendants pleaded *liberum tenementum,* to which plaintiff replied that the premises were the same upon which he had recovered judgment in a former action of trespass against the same defendant upon a traverse of the same plea. *Held,* that such former recovery was an estoppel to the pleading of the same title by the defendant or his privies. *Outram* v. *Morewood,* 484

7. *Estoppel to be plead specially, and at first opportunity.*—An award fixing the boundaries between two parishes, and fixing the *locus in quo* for the getting of stone (or jet ore) by the lords of the two manors. *Held,* not an estoppel upon a subsequent action of trespass for taking jet ore in the awarded premises, the estoppel not being pleaded specially and at the first opportunity. *Feversham* v. *Emerson,* 500

8. *Acquiescence by standing by at sale.*—In ejectment, an instruction to the jury "that if they believed from the evidence that plaintiffs stood quietly by, and saw and knew of the defendant's purchase of the premises, his possession and improvements of the same, and that the defendant purchased and improved the same in good faith and not in fraud of plaintiffs' rights, and that the plaintiffs did not notify him of their claim, then that they, the plaintiffs, are estopped from denying his rights." *Held,* error upon the facts stated in the case. *Green* v. *Prettyman,* 515

9. *No estoppel, where no consideration—Revocation of parol authority to receive dues for ore.*—A widow, owning a life interest in an iron ore bed, allowed her son-in-law, the owner of the reversion, to make a conveyance of it to an iron company, at a given rate per ton. The dues for ore were paid to him alone, or to her alone, or to either in the presence of the other; the receipts of either were taken by the company, and

ESTOPPEL. *Continued.*

for a number of years she allowed him to receive half the profits. Afterward she notified the company not to pay any dues except on her order, to which the company refused compliance, and she brought *assumpsit* for the dues accruing for the ore since the notice. *Held*, that as the widow was entitled to the profits of the iron ore for life, and there was no evidence that she had parted with her title thereto, she was not estopped from setting it up, as against her son-in-law, whose right was but a benefit or privilege granted by her, and which she could revoke at her pleasure. *Troxell* v. *Lehigh Crane Iron Co.*, 517

10. *Idem—Estoppel by assent to sale.*—2. That she was bound by the sale by him to the company, made with her knowledge and consent, and was estopped from repudiating it so long as the ore bed was worked in good faith. *Id.*

11. *Revocation by notice to third party.*—3. That her notice to the company was a good revocation of the authority of her son-in-law to receive any part of the amount due for ore; and that consequently the company were liable to her in *assumpsit* for all ore mined thereafter. *Id.*

12. *Estoppel against asserting parol rights, by quiescence at public sale—Innocent purchaser.*—The plaintiffs claimed that the original owner of the mill had agreed by parol that the free flow of water to the furnace should never be obstructed at the mill, but upon the decease of the mill owner his administrator sold the mill at public sale, and one of the plaintiffs was present, but gave no notice of any such contract. *Held*, that the plaintiffs were afterward estopped from setting up this parol contract to the injury of innocent purchasers of the mill. *Pool* v. *Lewis*, 523

13. *Abandonment no element of estoppel.*—In ejectment for a water ditch, an instruction which mingles two legal principles, abandonment and estoppel *in pais*, is objectionable. A party can not be held as estopped by matters *in pais*, to assert title, unless at the time when it is claimed the estoppel was worked, he held the title. If he then held such title, it can not at the same time be claimed that he had lost it by abandonment. *Marquart* v. *Bradford*, 528

14. *Estoppel by use of terms in a special sense—Royalty—Screened coal—Evidence.*—McKee sold the coal on his farm to defendant, reserving a perpetual royalty of ten cents for each ton "of screened coal mined and removed from said lands." The defendants mined and screened and removed both lump and nut coal. *Held*, that evidence was inadmissible to show that "screened coal" is understood among coal merchants and miners to include only "lump coal"; that "nut coal" is not "screened coal" in the common acceptation of the words, or, that at the time of the sale there was no market for "nut coal," and that it was removed from necessity and did not pay the expense of mining and marketing. *Mercer M. Co.* v. *McKee's Adm'r*, 531

15. *Lessee estopped by laches to assert his lease.*—Plaintiffs, in November, 1872, took a lease to commence January 1, 1873, for coal mining. They agreed to commence work as early as they could make the necessary preparations. They did nothing in the way of mining until June, 1874, when they sent an agent to demand possession, and one miner to com-

ESTOPPEL. *Continued.*

mence work. In the meantime, they had been notified that their lease was canceled and the premises had been sold to a company who had expended $65,000 in the construction of works to the knowledge of plaintiffs and without assertion by them of their claim. *Held*, that they were estopped both by their delay and their conduct to assert their lease against the company. *Wickersham* v. *Chicago Zinc Co.*, 536

16. *Essential elements of estoppel—Representations by adverse claimant to intending purchaser.*—The owner of the American lode made application for United States patent. The owner of the Bull of the Woods lode filed his adverse claim, and brought ejectment to support it. The surface plats showed an interference or crossing. Prior to such application an agent of such owner of the American lode, who was then about to purchase the same and was investigating the title, inquired of the owner of the Bull of the Woods whether he knew of any other claims that conflicted with such American lode. He replied that he did not unless it were the Inter-Ocean (a lode not in controversy). At the same time such agent remarked that his, plaintiff's, Bull of the Woods claim crossed the American, but that he understood it was a later location, to which such owner of the Bull of the Woods assented. *Held*, 1, that the first reply above stated was a false representation of fact, if the Bull of the Woods claim then existed, and that failure to assert a seniority to the Bull of the Woods title was a concealment of a material fact amounting to a representation as to a material fact; 2, that the presumption was that such owner of the Bull of the Woods had full knowledge of the facts relating to his own title, unless the contrary was affirmatively shown, which accordingly brought the case within the rule that false representation, to amount to an estoppel must be made with knowledge of the facts. *Patterson* v. *Hitchcock*, 543

17. *Idem—Mining titles extrinsic to the record—Relation back to discovery.*—3, that although both lodes were at the time recorded, but under a law which only required the record to state "the general course of the lode as near as may be," the record did not necessarily show the interference, and that therefore the owner of the Bull of the Woods could not escape an estoppel under the rule excepting cases where the real title is equally well known to both parties; nor could the record show which was the prior or senior title, as the older record may have been founded upon a prior discovery or *vice versa*, and while both location and record of one lode might be senior to the location and record of the other, if the date of discovery, which does not appear of record, were junior, such senior record and location would avail nothing against such senior discovery, discovery being the inception of title. *Id.*

18. *The effect, not the intent, material.*—If the effect of representations was to work a fraud, by inducing the inquirer to make a purchase which he would not otherwise have made, the actual intent of the speaker can not be material. *Id.*

19. *Pleading former judgment—Outstanding title.*—In pleading a judgment as an estoppel to an action or allegation, it must be made to appear that precisely the same point was in issue at the former trial, as

ESTOPPEL. *Continued.*

that now in question, or there can be no estoppel, hence a party who is ousted from the possession of a mining claim under one title is not estopped from purchasing another outstanding title to the same property and asserting title under that. *Meyendorf* v. *Frohner*, 559

20. *False representations—Estoppel in pais.*—To constitute an estoppel *in pais* for alleged false and fraudulent representations it must appear 1. That there were representations concerning material facts. 2. The representations must have been made with the knowledge of the facts. 3. The party to whom they were made must have been ignorant of the truth of the matter. 4. They must have been made with the intention that they should be acted upon. 5. They must have been acted upon. *Id.*

21. *Rules of estoppel in mining cases.*—The rules of law relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under a similar kind of title. *Kelly* v. *Taylor*, 598

22. *Resultant injury, essential to perfect estoppel in pais.*—Parties who allow a stranger to enter upon their mining claim without notifying him of the extent and nature of their claim will not be estopped from afterward setting up their title unless the stranger was injured by the silence of the owners. *Id.*

23. *Claiming property after assisting in leasing it.*—The lessee of a mine after making certain expenditures, surrendered his lease to the lessor to enable him to lease to another, but this intended new lease was never consummated. Afterward, and when the improvements were partly burned, the lessee said he was unable to take and work the mine, and requested the lessor to do the best he could with the property, and assisted in procuring another to take a lease without informing him of his claim to the machinery. *Held*, that the original lessee was estopped from claiming his improvements of the second lessee, or compensation therefor, in the absence of any agreement to pay for the same. *Stewart* v. *Munford*, 555

See LICENSE, 3.

EVIDENCE.

1. *Testimony irrelevant at the time offered.*—A decision of the court refusing to admit certain testimony, which was correct at the time of such refusal, will not be reversed because testimony subsequently introduced rendered the offered testimony material. *Depuy* v. *Williams*, 251

2. *Evidence excluded without prejudice.*—The defendant having introduced evidence of title to the premises in controversy by conveyance from the plaintiff, the latter offered proof that he was a minor at the date of the execution of the deed, and had repudiated the same immediately upon attaining his majority, but the court ruled out the evidence. *Held*, that the plaintiff having failed to make out a *prima facie* case, the exclusion of this testimony did not affect his rights. *Hebrard* v. *Jefferson M. Co.*, 270

3. *Value of secondary evidence.*—If secondary evidence be admitted at all, to establish a fact, it requires no more of such evidence than of the best; a preponderance is all that is necessary. *Silver M. Co.* v. *Fall*, 283

EVIDENCE. *Continued.*

4. *Practice Act construed—Development.*—The statutes of Nevada allowing mining suits in certain cases to be continued until further development is made, can not be construed as excluding all evidence as to the identity of the veins except that produced from actual workings. *Id.*

5. *Opinion of witness as to value of land.*—The opinion of a witness as to the amount of damages which a land owner will sustain by the appropriation of a portion of his land for the purpose of constructing a railroad over it is not admissible as evidence, but a witness may be allowed to give his opinion as to the value of the land affected. *Cleveland & P. R. R. Co.* v. *Ball*, 333

6. *Cross-examination as to interruption of transit.*—Where, in a proceeding by a railroad company to appropriate land for its use, an inquiry of damages is made, and it appears from the direct examination of a witness that on the tract of land over which the railroad is to be constructed there are coal mines, and that the building of the road between them and a navigable river would tend to prevent the coal from being taken from the mines to the river, the witness, on cross-examination, may be asked whether the facilities for transportation of coal to market would be diminished by reason of the construction of the road. *Id.*

7. *Parol evidence to vary written contract.*—Where a written contract is full and unambiguous, parol testimony will not be admitted to explain the understanding of the parties. *Belle Greene M. Co.* v. *Tuggle*, 464

8. *Copy of notice of location as evidence.*—A copy of a notice posted on a claim to show its extent is not admissible in evidence if the notice itself be obtainable. Such evidence is secondary, and is admissible only upon the terms which control its admission in other cases. *Lombardo* v. *Ferguson*, 588

9. *Parol testimony to explain the word "north"—Magnetic variation.*—In an action of trespass it appeared that the parties had entered into a written agreement as to the boundary line between their claims, and the question was whether parol evidence was admissible to show that the word *north* in the agreement referred to the magnetic and not the true meridian. *Held*, that such evidence was admissible to explain, not to contradict, the written language. That the ambiguity in the word north consists in the fact that it will admit of two interpretations, and not from any patent ambiguity. *Jenny Lind Co.* v. *Bower*, 589

10. *Execution of bill of sale, how proved—Handwriting of subscribing witness.*—Proof of the execution of a bill of sale of a mining claim by the vendor, and of the handwriting of the subscribing witness, who is absent from the State, is sufficient proof of the paper, even though the testimony of such subscribing witness might, by due diligence, have been obtained before his departure from the State. *Jackson* v. *Feather River Co.*, 594

11. *Identifying property described in deed—Order of proof.*—Where documentary evidence in the shape of conveyance of mining claims is admitted, further proof may be given, if requisite, to show the identity of the claims with those mentioned in the complaint, and the court will not control the order of proof. *Id.*

EVIDENCE. *Continued.*

12. *Cross-examination for purposes of denial.*—In an action to recover damages for injury to plaintiffs' mining claims, occasioned by the overflow of defendant's ditch, the plaintiffs' counsel had asked witness, "Did you see water splashing over the flume?" He answered in the affirmative, and on cross-examination was asked, "Whose water was that you saw splashing over the flume?" *Held*, that the question was proper cross-examination to show that the overflow was not occasioned by the acts or negligence of the defendant, but by acts of others; and that it was matter of mere denial, and not of such defense as is restricted to the opening of defendant's case. *Id.*

13. *Res gestæ—Declarations of miner.*—In an action to recover a quartz lode, the statement of the plaintiff, while working at a distance from the lode, that his object was to drain a ravine so as to run a tunnel into the lode, is admissible as a part of the *res gestæ*, and for the purpose of showing that the work was designed to be applied upon the claim. *Draper* v. *Douglass*, 601

14. *Evidence of value from subsequent working.*—Where, in support of an allegation of fraud in the purchase of a mining claim, it became material to show that the purchaser knew that he was paying an inadequate price, it was *held*, that the amount of gold dust extracted from the mine subsequent to the sale was not admissible to prove knowledge by the purchaser of the real value of the mine. *Henry* v. *Everts*, 603

15. *Proof of location and proof of purchase, distinguished.*—Where a company has taken up a claim by location, proof of a person being a member of the company would be competent, and his acting as such member would go to show his interest in the claim as a joint locator; but where a party claims by purchase he can only show title by the production of his deed, or proof of contents after loss and search. *King* v. *Randlett*, 605

16. *Parol explanation of calls and terms in deed.*—In an action involving title to a mining claim, plaintiff offered a deed conveying "all that certain piece of mining ground situated in Comer's field, on Swindle Hill, south of the road leading from Yankee Jim's to Todd's Valley, known as the Booth claims and marked by stakes and corners, four hundred feet front, more or less, and running back into the hill," which deed it was alleged covered the ground in dispute. *Held*, that parol evidence should have been allowed to show the relation of all the calls in the deed. *Reamer* v. *Nesmith*, 610

17. *Idem—Surplusage—Meaning of miner's phrases.*—If part of the claims were north of the road, there might still be enough true calls to enable the false to be rejected as surplusage, and that the phrase, "running back into the hill," might be shown to be a mining term and its meaning explained. *Id.*

18. *Questionable cancellation of stamps on note.*—A note sued upon was proved to be executed by the defendant, and the requisite amount of revenue stamps were upon it, canceled with defendant's initials; but it was doubtful whether some of the initials were in defendant's handwriting. *Held*, that this was clearly *prima facie* evidence to carry the note

EVIDENCE. *Continued.*

to the jury, and sufficient to prevent the court from taking from the jury the fact of an authorized cancellation. *Rees* v. *Jackson*, 615

19. *Inference of witness.*—The testimony of a witness that he took from what a party said that such party and another were partners, etc., is not evidence. It is a mere impression or inference. *Bragg* v. *Geddes*, 624

20. *Acts and declarations of incompetent witnesses.*—If a partner, when called against his co-defendant to establish the partnership, is not a competent witness, his acts and declarations are equally incompetent for that purpose. *Id.*

21. *Admissions of trustee prejudicial to his trust.*—Admissions made by a trustee to the prejudice of the trust fund and against the beneficiary are not competent evidence in a suit against the trustee and his *cestui que trust*. *Id.*

22. *Operation of evidence restricted.*—The operation of evidence is properly restricted to the purpose announced at the time it is offered and admitted. *Henry* v. *Everts*, 603

23. *Cross-examination—Imperfect transcript.*—It did not appear from the transcript that a question asked upon cross-examination was ever answered, nor did it appear but that the direct examination had laid a foundation for the question. *Held*, that the action of the lower court in overruling the objection to the question must be affirmed. *Hansen* v. *Martin*, 643

24. *Proof of extra work in suit upon contract.*—The plaintiffs sued for work done under a contract for the construction of a tunnel, the price to be paid upon estimates of an engineer; and the complaint alleged that the engineer, by collusion, and for the purpose of defrauding plaintiffs, had omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that they did extra work upon the promise of the engineer, ratified by that of the president of the defendant corporation, that the work should be paid for at the same rate as that contracted for. *Held*, that as the plaintiffs had sued only for work done under the contract, and not for extra work, the evidence was properly excluded. *Hinkle* v. *S. F. & N. P. R. R. Co.*, 645

See ADMISSIONS; CONVEYANCE 10, 13; DISTRICT RULES; EXPERT; LICENSE, 1; LODE, 3, 4; NEW TRIAL, 2; WITNESS.

EXCEPTION.

1. *Reservation construed as an exception.*—Words of reservation in a deed may operate by way of exception, and have effect when the subject of the reservation is a thing corporate and *in esse* when the grant is made, and not something created, as a rent or other incorporeal interest. *Whittaker* v. *Brown*, 656

2. "*Reserving*" *construed as* "*excepting.*"—The words "reserving all the minerals underlying the soil" evidently intend an exception of the minerals, and the deed should be construed accordingly notwithstanding the technical distinction between a reservation and an exception. *Sloan* v. *Lawrence Furnace Co.*, 659

See RESERVATION.

EXECUTION.

1. *Sheriff's sale—Levy.*—What property passes to a purchaser at sheriff's sale must be ascertained from the levy under the *fieri facias;* its quantity and character can not be extended or diminished by any subsequent official act of sale or conveyance. *Grubb* v. *Guilford,* 163

2. *Levy on stone before measurement* —A purchased from B the right to quarry and remove stone for the purpose of constructing certain locks, the quantity to be estimated *in the locks* and paid for at a certain rate per perch when the canal contractors should be paid. *Held,* that A had a property in the stone quarried by him for the purpose of delivery under his agreement with the canal contractors, which could be levied on and sold by the sheriff. *Watts* v. *Tibbals,* 662

3. *Ore buyer holding proceeds for special use—Garnishment.*—The old firm of B., G. & Co. advanced money to Y., a miner, with a distinct understanding that the next mineral which he should deliver to them should be applied in payment of such advance. The old firm was afterward dissolved and a new one formed of the same name; and B., who was a member of both firms, and was authorized to settle the business of the old one, bought mineral for the new firm from Y., and took possession of the same with the arrangement that the money due for the same was to be applied on the claim of the old firm against Y. *Held,* that on these facts the new firm were not liable as garnishees in a suit against Y. *Cahill* v. *Bennett,* 664

4. *Preference to laborers—Local statute.*—King and Morrow carried on mining; execution was issued against King for his individual debt, and his interest in the partnership sold by the sheriff. *Held,* that under the act of April 9, 1872 (Preferences to Laborers), the laborers for the firm had no claim on the proceeds of the sale, which only represented the interest of King incumbered with the joint debts. *Ward and Others' Appeal,* 666

See EJECTMENT, 26; PARTNERSHIP.

EXECUTORS AND ADMINISTRATORS.

1. *Kindness to the dead can not make a party liable as executor de son tort.*—Two citizens of Missouri were mining for gold in a wild, unsettled portion of California, living in the same tent, and working together. One of them died. The other sold the wearing apparel and took charge of deceased's share of the gold. Out of it he paid the burial expenses and started home, to Missouri, with the balance. On the way he was robbed of the gold. *Held,* that these were mere acts of kindness and Christian charity, and did not render defendant liable as an executor *de son tort. Graves* v. *Poage,* 670

2. *Idem—Gratuitous bailee liable for negligence.*—His only responsibility was for such care in transporting the property as a bailee without hire, to wit, for gross negligence, which was not proved. *Id.*

3. *Contract surviving to administrators.*—A coal mining company contracted with one Smith, to deliver to him three car loads of coal each week, from April 15, 1872, to October 15th, of the same year, at three dollars and seventy-five cents per ton, and six car loads per week from said last mentioned date till April 15, 1873, at four dollars per ton. The com-

EXECUTORS AND ADMINISTRATORS. *Continued.*

pany delivered coal as per contract until the death of Smith, in October, 1872, when they declined to deliver, on the ground of his decease. *Held*, that the death of one of the contracting parties did not put an end to such a contract, it not being of a personal character, nor within any other class of exceptional cases. That the administratrix had a right to demand its fulfillment, as she had done, and to recover damages for its non-fulfillment, either upon her own option, at her own risk, or under direction of the court, at the risk of the estate. *Smith* v. *Wilmington Coal Co.*, 679

4. *No power to organize mining company.*—Wadsworth devised to his executors certain undeveloped coal lands in trust for his daughters, with power to lease, or sell and convey said real estate, and to invest the proceeds in other lands or buildings, or bonds and mortgages, or in such other securities as they shall deem safe, etc. The executors conveyed the lands for the purpose of organizing a mining company to develop them, and took stock of the corporation in payment. The funds of the company became exhausted and bonds were issued secured by a mortgage on the lands, and the bonds sold to raise money to build a railroad to the lands. To protect their stock the executors were compelled to purchase some of these bonds, which they did as an investment for the estate, crediting themselves with the purchase price thereof. *Held*, that notwithstanding the power of sale contained in the will, the executors were not authorized to make the disposition which they did of the lands; that the willingness of the testator in his lifetime to make a similar disposition of the lands, could not enlarge the powers of the executors; that the executors were responsible for the value of the land at the time they conveyed it away; that the bonds were not such a security as a prudent executor or trustee would voluntarily have accepted as an investment for trust funds, or as the rules of courts of equity would have sanctioned; and that the purchase of the bonds must be treated as an investment on their individual account, not chargeable to the estate. *Adair* v. *Brimmer*, 682

5. *Accounting by executors.*—Debts owing by individual executors to the estate should remain in the account as assets of the estate and it is not proper to credit them to the executors as uncollected debts. *Id.*

6. *Payments by debtor executors.*—A mortgage debt due by the estate was, with the consent of the executors, cancelled by the personal obligation of two of them who were indebted to the estate, but the estate afterward paid the obligation. *Held*, that under the peculiar circumstances of the case, it was not the intention of the parties to relieve the estate from responsibility, and that the payment should be allowed. *Id.*

7. *Overpayments to legatees.*—Executors are not entitled to credit for interest paid to raise money with which to make advances to legatees beyond their distributive shares, nor can they claim credit for overpayments and thereby diminish or postpone the amounts payable to other legatees. Such excessive payments remain assets of the estate, and the executors are immediately liable to account for the same; nor can they apply them in anticipation of sums which may thereafter become due to the legatee so overpaid. *Id.*

EXECUTORS AND ADMINISTRATORS. *Continued.*

8. *Duties generally.*—For the duties and liabilities of the executors of a large estate and the proper mode of accounting, see the opinion. *Id.*

9. *Liability for co-executor's default.*—Where one of the executors was intrusted with certain stocks and bonds on his promise to sell the same and pay the proceeds into the general fund, *held*, that trusting to this promise was not such negligence or improvidence on the part of the executors as to render them liable for the default of their co-executors. *Id.*

10. *Estate of intestate liable for certain of his torts.*—An administrator is liable to an action for money had and received by the intestate, for coal tortiously taken by him from the plaintiff's land, if the intestate has sold it and received the money, although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. *Powell* v. *Reese*, 676

See WITNESS, 3.

EXPERT.

1. *Underground railroad crossings—Evidence.*—When it is sought, in the exercise of eminent domain, to construct an underground railroad crossing the railroad of a coal mine owner, down in the mine, "the dangers and delays of crossing the plaintiff's road" are fit matters to be considered by the jury, aided by the testimony of skilled witnesses, in arriving at the measure of damages. Such dangers and delays may be reasonably anticipated, and the plaintiff is not bound to wait until their actual experience, when it would be too late for compensation. *Brown* v. *Corey*, 368

FLOODING—See DIP.

FORFEITURE—See DISTRICT RULES, 6.

FRAUD.

1. *Sale in fraud of creditors—Knowledge of purchaser.*—When a debtor has sold a mining claim in fraud of his creditors, as alleged, the sale can not be set aside for inadequacy of price alone, if such inadequacy of price was not known to the purchaser, and he was otherwise a stranger to the vendor's fraudulent intentions. *Henry* v. *Everts*, 603

2. *Purchase of oil stock induced by forged telegram—Case for jury.*—R. received a forged telegram purporting to come from S., by which he was led to purchase oil stock of J., and gave his note in part payment of the purchase price. In a suit upon the note by J., the defense was that the forged telegram was procured to be sent by the plaintiff. The telegram was offered in evidence by the defendant, but ruled out on the ground that the plaintiff had not been shown to be connected with the sending of it, and the court directed a verdict for the plaintiff. *Held*, that although there was no direct proof that J. knew of the sending of the telegram, yet it was a link in a chain of circumstances developed on the trial sufficiently strong to require its admission in evidence, and the submission of the case to the jury. *Rees* v. *Jackson*, 615

See ABANDONMENT, 4; ESTOPPEL, 16, 18, 20; PATENT, 3.

INJUNCTION.

1. *Injunction against diversion.*—In a suit for the diversion of water, and praying for a perpetual injunction against its diversion, the defendants contended that the plaintiffs were not entitled to equitable relief, and that an action of ejectment would afford a legal remedy. *Held*, that the relief prayed for was appropriate to the case stated in the complaint. *Fabian* v. *Collins*, 20

2. *Practice on appeal from preliminary order.*—A preliminary injunction must stand or fall according to the merits of the case when granted. *New Boston Co.* v. *Pottsville Co.*, 118

3. *Power to enjoin should be cautiously used.*—An injunction is a high exercise of power, and should be very cautiously exercised; but when large and expensive works are sought to be stopped for something incident to their lawful employment, and not on account of direct or wilful encroachment, it should be made clearly to appear that it is a case for equitable intervention; that there is no adequate remedy at law, and that otherwise irreparable injury will ensue. *Id.*

4. *Necessity to justify its exercise.*—The necessity, to justify the writ, should amount to a case where compensation could not be made. *Id.*

5. *Act of June 16, 1836, construed.*—Under the act of June 16, 1836, the courts are invested with full chancery powers over corporations, and may restrain a corporation from doing an unconscionable thing outside of its ordinary business, as well as within it. *Big Mountain Improvement Co.'s Appeal*, 178

6. *Injunction against building unchartered railroad.*—A railroad company organized for the benefit of coal mines, and not within any of the statutes authorizing the condemnation of lands for railroads connecting with coal mines, should be enjoined from constructing its road across private property. *Edgwood Railroad Co.'s Appeal*, 406

7. *Injunction must be based on suit to test title.*—Equity will restrain a trespass against a mine, but unless there is some special ground for relief in equity, the title to the estate must be settled at law. Regularly the law action should be brought first, but the rule is so far relaxed that the working of the mine and the removal of ore may be enjoined upon the plaintiff undertaking to bring an action for possession, and to prosecute it with diligence. *Stevens* v. *Willams*, 449

See DRAINAGE, 6, 13; EQUITY, 3, 7; ESTOPPEL, 4.

INSPECTION—See JURY.

JUDGMENT—See EMINENT DOMAIN, 4.

JURY.

1. *Treating jury to liquor during inspection of mine—Verdict.*—Upon the return of the jury from viewing a mine, in company with the sheriff and two persons appointed by the court, at the instance of the plaintiffs and defendants respectively, to point out the premises and explain the controversy, the one appointed at the instance of the prevailing suitors treated the party to liquor. *Held*, that his interest in the controversy was not of such a character as to vitiate the verdict. *Schissler* v. *Chesshire*, 309

See PLEADING AND PRACTICE, 2.

LACHES—See ESTOPPEL, 15.

LEASE.

1. *Effect of surrendering lease.*—Where a lessee of a mine makes a written surrender of his lease in view of a contemplated sale of his improvements and machinery to enable the lessor to make a new lease to the purchaser, the original lease, in law if not in equity, is canceled, and the lessor re-invested with the legal title to the term; and, without any new writing to restore the term, the lessor may again lease and pass the title free from the claim of the first lessee. *Stewart* v. *Mumford*, 555

2. *Compulsory production of books to ascertain rental value.*—An order to produce books and papers showing the amount of sub-rents received by defendants and the amount of salt manufactured, is a proper process toward ascertaining the rental value of the premises in controversy. *Stuart* v. *White*, 454

See ABANDONMENT, 5.

LICENSE.

1. *Parol license—how proven.*—A parol license which when given and executed should be upheld and enforced in equity, may be proven by parol; *e. g.*, a license to use a ditch for conveying water across another's land. *Gooch* v. *Sullivan*, 14

2. *Oral license to use water, valid but not assignable.*—A personal license for the diversion of water from Ottawa gulch to Jenny's basin, during the time that the licensors do not require the same in the gulch, is not a conveyance of an interest in lands, and is valid, although not reduced to writing and recorded. Such license should be limited strictly to the original parties, and can not be sold or transferred to others. *Fabian* v. *Collins*, 20

3. *Licensees are estopped from disputing the prior rights of the licensors*, and if third parties purchase such license, and enter into possession, their appropriation will only date from such possession. *Id.*

4. *License by devise.*—A testator gave to three sons a tract of land to be divided among them in portions designated by the will, adding: "further I devise, etc., to my said sons each an equal privilege forever of the coal bank now opened and the ground on the ridge adjacent, so far as may be necessary for digging and taking coal." It seems that the privilege extended to every part of the tract containing coal which might be mined through the opening. *Carnahan* v. *Brown*, 193

5. *How made perpetual.*—When the land was entered upon and the license made effectual by Watson's performance of the covenants and a successful result of the experiment, it became perpetual and irrevocable. *Rynd* v. *Rynd Farm Oil Co.*, 275

See DITCH, 3; ESTOPPEL, 1; VENDOR AND PURCHASER, 2.

LOCATION.

1. *Validity of location, when not to be questioned.*—The regularity and validity of the location of a mining claim can not be questioned in a suit in ejectment, where both parties claim title under the original locators. *Union M. Co.* v. *Taylor*, 323

LOCATION. *Continued.*

2. *Limit of time for sinking discovery shaft—Reasonable time as a question of law.*—What is to be regarded as a reasonable time for sinking a discovery shaft, when the facts are undisputed, is a question of law; but if the question is submitted to the jury with the instruction that ninety days is not a reasonable time in which to sink it, the discoverer can not complain if the limit thus fixed would, under the testimony, admit of a finding in his favor. *Patterson* v. *Hitchcock*, 543

3. *Presumption that the location covers the vein.*—A location of a lode mining claim will be presumed to include the vein upon which the discovery was made, until the contrary appears. *Id.*

4. *Extent of location, how proven—Explanation of notices.*—In an action to recover possession of mining ground arising from dispute as to boundaries, a witness who testifies that plaintiffs' location was made both by posting notices and marking boundaries, may testify whether the disputed premises are included within such boundaries; and an objection that the notices are the best evidence of the extent of the location is not well taken. *Kelly* v. *Taylor*, 598

See LODE; RELOCATION.

LOCATION CERTIFICATE—See EVIDENCE, 8.

LODE.

1. *Recovery of lode with surface.*—Where a miner locates a portion of the surface, and also a lode with its dips, angles and spurs, he may have his common law judgment for the surface, and judgment also for the lode following its course under other public lands. *Bullion M. Co.* v. *Cræsus M. Co.*, 255

2. *Outcropping lode.*—Where a ledge located as such comes to the surface, locator may recover the surface provided the outline of the ledge is visible on the surface. *Id.*

3. *Question as to whether lode or spur—Degree of proof necessary to support a theory.*—Plaintiff and the defendants, claimants on different parts of the Arizona lode, had agreed upon a division line, the defendants receiving from the plaintiff a conveyance of all its interest north of the line, and the plaintiff taking a like deed for the interest of defendants south of the line, and the defendants being charged with working a deposit on plaintiff's side of the line, attempted to show that the deposit was a separate ledge, or if the same, it was a spur which struck off from the Arizona ledge at a point north of the line, the plaintiff asserting that it was a single ledge, neither theory being demonstrated by complete developments. The court instructed the jury that when the plaintiff attempts to recover a mining claim upon the strength of a stated theory "the existence of such a theory must be established by the plaintiff conclusively, and not merely by a preponderance of evidence." It was *held*, that such charge was error. *Held further*, that the word "existence" if taken literally, reduces the words of the charge to nonsense, and was intended for "correctness," but that the charge was as apt to mislead the jury in the form in which it was given, as if proper language had been used. *Silver M. Co.* v. *Fall*, 283

LODE. *Continued.*

4. *Evidence—Theory of veins.*—When the establishment of the plaintiff's case depends upon the establishment of a theory as to a vein formation, the correctness of the theory need not be established by any stronger proof than would be required for the case itself, *i. e.*, by a preponderance of evidence. *Id.*

5. *Departure of vein from side lines.*—But when the vein has been proved to leave the lines of the location in fact, the location beyond such point of departure is defeasible, if not void, both as to the vein and the surface located. *Patterson* v. *Hitchcock*, 545

See EJECTMENT, 28, 29; LOCATION.

MEASURE OF DAMAGES.

1. *Salt supply of Confederate States.*—The enormous demand for salt in the Confederate States during the war, caused by the blockade, considered as increasing the rental value of salines during that period. *Stuart* v. *White*, 455

2. *Real and market value of mines.*—In ascertaining whether the price paid was inadequate, the inquiry must be restricted to the market value of the property at the time of sale. And this may be very different from its intrinsic value. This is peculiarly the case with a mine, the real value of which, at any given time, can only be ascertained when the mine has been exhausted *Henry* v. *Everts*, 60

See EMINENT DOMAIN; TROVER, 2.

MERGER—See CONTRACT, 1.

MINERALS—See EMINENT DOMAIN, 6.

MINES.

1. *Common law doctrine modified.*—The common law doctrine that he who possesses the surface owns to the center of the earth, is greatly modified as to the rights of miners and others on the public lands. One party may be entitled to occupy the surface, and another the mineral veins running under the same land. *Bullion M. Co.* v. *Crœsus M. Co.*, 255

MISNOMER—See CORPORATIONS, 1.

NEGLIGENCE.

1. *Responsibility for accident from natural causes.*—A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. *Fletcher* v. *Smith*, 78

NEW TRIAL.

1. *Affidavit of new witness in support of new trial.*—A motion for new trial on the ground of newly discovered evidence should be accompanied with the affidavit of the witness as to what he will testify; the affi-

NEW TRIAL. *Continued.*

davit of the moving party is not sufficient, and lack of time for obtaining the necessary affidavit will not excuse the party; he should apply to the court for more time. *Jenny Lind Co.* v. *Bower*, 590

2. *Irrelevant testimony.*—The admission of irrelevant and immaterial testimony is not ground for a new trial unless the party was prejudiced by it. *Hanson* v. *Martin*, 645

NONSUIT.

1. *Practice on appeal from judgment of nonsuit.*—In considering the correctness of the ruling of the court below in granting a nonsuit, this court will consider as proven, every fact which the evidence tended to prove. *Herbert* v. *King*, 303

See PLEADING AND PRACTICE, 11.

NOTICE.

1. *Reasonable notice* is relative, and depends upon the work to be performed. *Philadelphia Co.* v. *Taylor*, 133

2. *Sufficiency of notice to produce papers—Description.*—The sufficiency of notice to produce a paper shown to be in the possession of a party, is a question of discretion, and if it were impossible to procure it between the time of giving notice and the trial, the fact should be made to appear. Such a description of the paper as will apprise a man of ordinary intelligence of the document desired, is enough. *Burke* v. *Table Mountain Co.*, 209

3. *Constructive notice by record* only applies to those cases where the instrument recorded has been properly certified (acknowledged) as required by the statute. *Wickersham* v. *Chicago Zinc Co.*, 536

OIL.—See EJECTMENT, 32-34; EMINENT DOMAIN, 19.

PARTIES.

1. *Corporation interested as plaintiff, made defendant.*—Where it is sought to enjoin the collection of purchase money from a corporation on the ground that the complainants—the stockholders—were induced to buy on representations that its property was unincumbered, its own agents also joining in the misrepresentation, the company may properly be made a defendant, although the relief prayed for would operate in its favor. *Jones* v. *Bolles*, 444

2. *Stockholders' suit—Parties.*—It is a general rule that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation, and that ordinarily it can not be brought in the name of the stockholders; but if the directors refuse to prosecute, by collusion with those who have made themselves answerable by their negligence or fraud, or if the corporation is under their control, the stockholders, who are the real parties in interest, will be permitted to bring the suit and make the corporation a defendant. *Burke* v. *Flood*, 469

See EJECTMENT, 5, 20.

PARTITION.

1. *Indivisibility of mines.*—Mines are from their nature indivisible and not partible (in most cases). The only partition that can be made is by sale, dividing the proceeds. *Lenfers* v. *Henke*, 68

PARTNERSHIP

1. *Sale of partnership property for individual debts.*—A levy and sale of partnership property under an execution for the individual debt of one of the partners, passes his interest only; this can be determined only by an account of the partnership affairs. *Ward and Others' Appeal*, 666

PATENT.

1. *Government patents granted subject to vested water rights—R. R. grants.*—The N. Water and Mining Co. was the owner of a ditch in California which it had constructed on the public land in 1853 and its right of way and use of the water was recognized uniformly by the local customs, laws and decisions of the courts of that State. B. acquired title to certain land through which the ditch ran by pre-emption made after the passage of the act of July 26, 1866, which declares that certain water rights shall be protected. B. also acquired title to another portion under the grant made to the Central Pacific Railroad Company by the amended Pacific Railroad Act of July 2, 1864. B. thereupon brought suit against the N. Co. for damages and sought to have the ditch abated as a nuisance. *Held*, that as to the land acquired by pre-emption, B.'s title was subsequent to the act of 1866 and he took subject to the right of way of the N. Co.; and as to the other, although the grant to the railroad was prior to the act of 1866, yet that act was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. Moreover the grant to the railroad expressly declared that it should not defeat or impair any lawful claim which would include such a claim as that of the N. Co. *Broder* v. *Natoma Co.*, 33

2. *Conflicting rights of appropriator of water and patentee of land.*—In a suit for the diversion of the water of a stream which flowed through land which the plaintiff had occupied since 1863, and for which he obtained a patent from the United States in 1871, it appeared that the defendant's grantors had appropriated the water of Echo lake, the source of the stream, for a canal, as early as 1860, but that the principal part of the work of constructing the canal was done after 1868. *Held*, that the right of the plaintiff as riparian proprietor attached only after the patent issued and did not relate to the date of his settlement, or the filing of his declaratory statement, and that such rights were subject to the rights of the prior appropriator of the water. *Osgood* v. *El Dorado M. Co*, 37

3. *Fraud in obtaining patent.*—A patent which has been obtained from the United States by fraud can only be attacked by the United States. *Meyendorf* v. *Frohner*, 561

PLEADING AND PRACTICE.

1. *Practice in Supreme Court—Objections to evidence.*—The Supreme Court will only consider objections to evidence upon grounds specified in

PLEADING AND PRACTICE. *Continued.*

the court below, and will not reverse a ruling admitting or rejecting evidence upon a ground in no way suggested at the time of objection, and which the court was not called upon to decide. *Gooch* v. *Sullivan*, 14

2. *Jury trials in equitable proceedings.*—In such a suit the remedy sought being equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. *Fabian* v. *Collins*, 20

3. *Practice in Montana—Special findings.*—Under the Practice Act of Montana, when there is no special finding upon an issue presented by the pleadings, but the decree recites that the equities are with plaintiffs, it will be presumed that the court found the issue for the party for whom judgment is rendered. *Id.*

4. *Notice of appeal, when sufficient.*—Legal notice of appeal was not served upon the respondent, who was a non-resident, and the statutory method of perfecting notice in such case was not clear. But it appeared that respondent had actual notice of the appeal in season to prepare his defense. *Held*, that under the circumstances the court would entertain jurisdiction. *Coates* v. *Cheever*, 55

5. *Reasons for finding no part of judgment.*—The reasons given for a finding are not judgments. The point decided is the thing fixed by the judgment. *Burke* v. *Table Mountain Co.*, 210

6. *Finding of fact not conclusive as to right.*—A finding that a defendant is not in *fact* in possession of the premises in controversy, is not conclusive as to his *right* of possession. *Id.*

7. *Reversal on appeal.*—For error in refusing to give an instruction to the jury, the Supreme Court will not undertake to determine how far the party excepting was prejudiced, but will reverse the judgment. *Busenius* v. *Coffee*, 215

8. *Ruling by consent not reviewed.*—A ruling made by consent of parties can not be subject of consideration in the Supreme Court. *Coryell* v. *Cain*, 227

9. *Defect in complaint ignored after verdict.*—The complaint alleged an ouster in 1856, and that plaintiffs' title was acquired in 1859. *Held*, if not a clerical error, it is a defect which can not be taken advantage of after verdict. *Id.*

10. *Objections to misjoinder, how taken.*—By the Practice Act in California, objections to the misjoinder or nonjoinder of parties must be taken by demurrer or answer, and if not so taken are to be deemed waived. *Rowe* v. *Bacigalluppi*, 237

11. *Nonsuit because of misjoinder.*—A motion for nonsuit on the ground of misjoinder should not be granted if it appear that some of the plaintiffs are entitled to recover. *Id.*

12. *Instruction upon points not involved.*—Where in a suit for the recovery of a mine upon the public domain, the plaintiff requested the court to charge, "that the doctrine that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case; the real question here involved is, which of the parties, the plaintiffs or defendants, have the better right

PLEADING AND PRACTICE. *Continued.*

to mine the land in question;" and it was claimed that without it the jury might have presumed the title to be in the United States, and therefore found against the plaintiff, but no suggestion on such point appeared to have been made to the jury on the trial. *Held*, that the refusal of the instruction was not error. *Schissler* v. *Cheshire*, . 309

13. *Special findings not to include evidence.*—The case was tried by the circuit court upon the written stipulation of the parties, and the court found that W., under whom plaintiff claimed title, was the owner of the premises in controversy at the date of his sale to plaintiff. Defendant objected that the findings did not sufficiently set forth the conveyances by which W. derived title. *Held*, that special findings should give only the ultimate facts and not the evidence, and that the ownership of W. was an ultimate fact, of which the conveyances would only be evidence. *Union M. Co.* v. *Taylor*, 324

14. *No reversal for error without prejudice.*—The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent that it can not have affected the findings injuriously to the plaintiff in error. *Id.*

15. *Practice—Withdrawal of appeal.*—An appeal from a report of viewers, under the Lateral Railroad Law, can not be withdrawn after the time has elapsed in which the opposite party might have appealed, without the written consent of such opposite party. *Brown* v. *Corey*, 368

16. *Jurisdiction—Multiplicity of suits.*—Questions relating to an ouster, jurisdiction arising from a misjoinder of parties, and of the right of each stockholder to institute a suit, suggested but not decided. *Dannmeyer* v. *Coleman*, 474

17. *Defenses should be separately stated.*—Each defense should be complete in itself, and a cross-complaint should be separate from the other defenses. *Meyendorf* v. *Frohner*, 560

18. *Practice on appeal as to counter-exception.*—It is the practice of the Supreme Court of California to look only to the errors assigned by appellant, and not to consider exceptions taken by respondent. *Jackson* v. *Feather River Co.*, 594

19. *An appeal which rests upon the Statute of Limitations* will not be considered if the transcript fails to show when the action was commenced. *Reamer* v. *Nesmith*, 610

20. *Where a material allegation of the bill is positively denied* by answer under oath, it must be established by proof sufficient to overcome the answer and opposing evidence. *Bragg* v. *Geddes*, 624

21. *An appeal on the ground that the evidence fails to sustain the verdict*, will be disregarded if the statement fails to specify the particulars in which the evidence is claimed to be insufficient. *Reamer* v. *Nesmith*, 610

22. *Instruction concerning matters not in record.*—The court instructed the jury that if the estimates of the engineer were honestly made, they were conclusive. *Held*, that as the bill of exceptions did not contain the contract under which the work was done, nor any evidence upon th points to which the instruction complained of related, the instruction could not be said to be erroneous. *Hinkle* v. *S. F. & N. P. R. R. Co.*, 645

PLEADING AND PRACTICE. *Continued.*

See ABANDONMENT, 2, 6; EJECTMENT; EQUITY; ERROR; ESTOPPEL; NONSUIT; VERDICT.

POSSESSION.

1. *Proof of possession.*—Where one of two defendants had surrendered possession of the premises in controversy to the other, this fact was sufficient to support the finding that the latter was in possession. *Burke* v. *Tabl Mountain Co.*, 209

2. *Evidence of surrender of possession.*—An "agreement of cancellation" of a lease of a ditch and the surrender of possession to the lessor, although no consideration may have been expressed in the agreement, is sufficient to justify a finding that the tenant (defendant in ejectment) was not in possession of the premises. *Id.*

3. *What is sufficient on the public domain.*—The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation—a subjugation to the will and control. *Coryell* v. *Cain*, 226

4. *Presumption from possession.*—Prior possession of the plaintiff being established, he is presumed to have complied with all the requirements of the *lex loci* peculiar to that mining district, necessary to the acquisition of the title declared on. *Sears* v. *Taylor*, 318

See CONVEYANCE, 4, 8; EJECTMENT, 9, 38, 40.

PRODUCTION OF PAPERS—See NOTICE, 2.

RAIL ROADS—See EMINENT DOMAIN; EXPERT, —; INJUNCTION, 6.

RELATION.

1. *Relation as applied to appropriation of water.*—The question whether a person has made a valid appropriation of water depends on the questions whether he has given proper notice of his intention to appropriate it, and whether he has prosecuted the work in that behalf with reasonable diligence. If he has done both of these, his rights on the completion of the work relate back to its commencement. *Osgood* v. *El Dorado M. Co.*, 38

RELOCATION.

1. *Relocating claim the title of which is doubtful.*—The acquiring of mining ground by location is procuring such right by purchase; and one in possession of mining property under a title determined in court to be invalid can not be charged with fraud because he relocated the same before such determination; he stands in no different condition than one who buys an outstanding title. *Meyendorf* v. *Frohner*, 559

RENTS AND ROYALTIES—See DITCH, 3; ESTOPPEL, 14.

RES ADJUDICATA—See DITCH, 1; ESTOPPEL, 6, 19.

RESERVATION.

1. *Reservation of coal in deed.*—Where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free in-

RESERVATION. *Continued.*
gress and egress by wagon road to haul the coal therefrom as wanted," it was *held*, that the saving clause operated as an exception of the coal, and therefore, that the entire and perpetual property therein remained in the grantor. *Whittaker* v. *Brown*, 656
See EXCEPTION.

RIGHT OF WAY—See DITCH, 2; EASEMENT, 1; EMINENT DOMAIN; TAILINGS, 2.

RIPARIAN RIGHTS.
1. *Riparian rights of furnace and mill owners.*—In a suit by the owners of a furnace on Stump creek against the owners of a mill higher up the creek, for interrupting the flow of the water, it was *held*, that the statutes of Georgia have not changed the common law rule relative to the use of streams not navigable. They secure to the owner of the land, over which the stream passes, the legal use of it, for the purpose of propelling such machinery as is suited to the size and capacity of the stream, provided the water is not obstructed for an unreasonable time, and is not diverted from its natural channel when it passes to the lands of the next proprietor. *Pool* v. *Lewis*, 523

SIDE LINES—See LODE, 5.

SPECIFIC PERFORMANCE.
1. *Contract of purchase.*—Tuggle purchased land containing two hundred acres, less one acre reserved by the vendor. The vendor also reserved the right to all ores, minerals, etc., on the land, and the privilege of repurchasing the entire tract at a specified price upon giving twelve months notice. The B. G. M. Co. purchased the one acre and the privileges reserved by Tuggle's vendor, and began a mining business. To carry on the work it became necessary for the B. G. M. Co. to have five acres of land contiguous to its mine, but Tuggle refused to convey it unless the B. G. M. Co. would take the whole tract, which the latter agreed to do upon the terms specified in the deed to Tuggle, and thereupon took possession of the five acres. Tuggle had begun improvements which he discontinued after the agreement, and at the time specified he offered to make the conveyance, but the B. G. M. Co. failed to comply with its contract, and Tuggle brought a bill for specific performance. *Held*, that there was equity in the bill. *Belle Greene M. Co.* v. *Tuggle*, 464
2. *Vendor keeping possession after contract made.*—Where the B. G. M. Co. agreed to purchase land and take title thereto at a future date, and thereupon entered on parcel of the tract, but failed to comply with the agreement to purchase, the right of the vendor to specific performance was not lost by the fact that he remained in possession after such failure, he holding himself in readiness to make conveyance upon compliance with the contract by the B. G. M. Co. *Id.*

SPRINGS—See DRAINAGE, 5; WATER.

STATUTE OF FRAUDS—See DOWER, 12.

STATUTE OF LIMITATIONS.

1. *Statute of Limitations applied to tenants in common.*—The possession of one tenant in common of a mining claim is the possession of his co-tenant, and if one of them be ousted the Statute of Limitations (which in Nevada is fixed at two years' adverse possession), would begin to run only from the date of such ouster. *Union M. Co.* v. *Taylor*, 323

2. *Adverse possession as a bar to ejectment.*—Two years' adverse possession being a matter of defense under the Statute of Limitations in this case, should be made to appear affirmatively. *Id.*

3. *Defense of the statute by foreign corporations.*—Foreign corporations can not avail themselves of the protection of the Statute of Limitations in Nevada. *Id.*

4. *Averments necessary in bill to avoid bar of statute.*—A statute provided that an action for relief on the ground of fraud must be brought within three years, the cause of action not being deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. *Held*, that upon suit for acts performed more than three years before, the bill must aver that the facts constituting the fraud were not discovered till within three years. *Dannmeyer* v. *Coleman*, 475

See ADVERSE POSSESSION; EJECTMENT, 25.

STOCK.

1. *New stock, in lieu of lost certificate, issued to innocent purchaser.*—A certificate of shares of the stock of an incorporate mining company was lost, or stolen from the owner's possession, having attached to it a blank power of attorney for its transfer, signed by the original holder, of whom the loser purchased it. The owner, upon the loss, notified the company thereof, and not to transfer the stock on its books without his consent. Upon this notice the company instructed the loser how to proceed to obtain a new certificate; but he never proceeded for that purpose. Four months afterward the certificate, with the blank power of attorney annexed, was purchased of one who had possession of it, by a purchaser who had no knowledge of the loss, and who bought in good faith. The purchaser induced the company, against the previous caution of the loser, to transfer the stock on its books and issue him a new certificate, which he then sold to the plaintiff. The plaintiff applied to the company for a transfer on its books, and a certificate to him, which the company refused, alleging the dispute about the ownership as a reason for such refusal. *Held*, that although the plaintiff bought with full knowledge of all the facts known to his vendor, and of his vendor's knowledge of them, the company, by permitting the transfer to said vendor, and the issue of such new certificate, were estopped from denying plaintiff's ownership, and refusing the transfer to him. *Mandlebaum* v. *North Am. M. Co.*, 506

2. *Quasi negotiability of stock.*—By Section 7, Chap. 55, of the Revised Statutes, certificates of shares of stock, in companies organized pursuant to said chapter, may be transferred by indorsement and delivery, so as to confer a valid title as between the parties thereto; and *semble*, that the holder of a certificate so indorsed and transferred is entitled to the same

STOCK. *Continued.*
rights respecting it, as against third parties, which the law confers upon the holder of commercial paper. *Id.*

SURFACE.
1. *Surface right restricted to coal breaker and dump.*—The grant of a surface right with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt," is the grant of an easement only, although described to be in fee. *Big Mountain Improvement Co.'s Appeal*,
See LODE, 1. 178

TAILINGS.
1. *Upper and lower claims—Right to deposit tailings.*—Plaintiffs owned mining claims below, and defendants above, in the bed of the same stream. Defendants' claims were located first, but plaintiffs' claims were located before the working of the claims above affected those below. Defendants constructed a flume extending down to and upon plaintiffs' claims, which carried a large quantity of tailings down upon the lower claims. *Held*, that defendants had no easement or right to enter upon plaintiffs' land and erect such structure. *Esmond* v. *Chew*, 175
2. *Right of way.*—The fact of the relation of the mining claims to each other on the same stream does not give the upper claimant a right of way of necessity over the lower claims. *Id.*
3. *Local custom must be averred and proved.*—If there is any local mining custom giving an upper claim the right to carry a flume and dump tailings upon a lower claim, such custom must be averred and proved. *Id.*
See DUMP.

TENANT IN COMMON—See ABANDONMENT, 1; ADVERSE POSSESSION, 2; DOWER, 11; EJECTMENT, 5, 17, 27, 30.

TRESPASS.
1. *Separate actions for a series of trespasses.*—Where part of the coal was raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass under stat. 3 and 4 W. 4, c. 42, s. 2, for so much as was raised within the six months, and also money had and received for so much as was raised before, the acts being distinct, and the two actions therefore not incompatible. *Powell* v. *Reese*, 676
See EJECTMENT, 42; ESTOPPEL, 6; EXECUT. AND ADM., 10.

TROVER.
1. *Trover for coal severed.*—Coal having been severed from the freehold in constructing a lateral railway, it became the property of the owner of the freehold, and trover lay against the owner of the railroad for selling it. *Lyon* v. *Gormley*, 383
2. *Measure of damages.*—The general principle is that damages in trover are to be assessed as of the time of conversion; in this case it was at the sale of the coal. *Id.*

TRUST.

1. *Trustee and cestui que trust.*—A party who seeks to have another, who has secured a patent title by alleged fraudulent means, adjudged a trustee of such title for his use, must first show himself entitled to a patent from the United States upon his equitable title. *Meyendorf* v. *Frohner*, 560

2. *Resulting trust.*—There can only be a resulting trust where property is acquired and held in the name of one person, which, in equity, belongs to another, and this can not be true of property given to an individual for his own use. *Bragg* v. *Geddes*, 625

3. *Ratification by cestui que trust.*—To establish a ratification by a *cestui que trust* it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his legal rights in the matter. *Adair* v. *Brimmer*, 682

VENDOR AND PURCHASER.

1. *Title of vendee.*—A purchaser of a mining claim only acquires such right or title from his vendor as he had at the time of such purchase. *Waring* v. *Crow*, 204

2. *Iron furnace and ore contract—Construction, whether sale or license.*—Articles of agreement between Mensch and Hughes were entered into, reading in substance as follows: "M., in consideration of one dollar, receipt acknowledged, doth grant unto H., his heirs and assigns, the exclusive right and privilege of searching for, digging, raising and carrying away from off the land (description) all the iron ore and limestone on said land, and also timber sufficient to be enabled to work to advantage, with sufficient room for deposit of ore, limestone and dirt, and also the privilege of erecting as many necessary houses and buildings as the said H. may require for the successful operation of an iron furnace; H. agreeing to pay twenty cents for each ton of clean ore he takes from said land, in payments on each first day of January." H. entered and mined under this agreement, but erected no iron works. In ejectment by his assigns for a stone quarry of three acres on the land, *held*, that though the operative words of the agreement would pass all title to the ore, yet that the real consideration was the erection of iron works, which not having been erected, the agreement, all its parts being considered, should be taken as a sale without consideration, and, therefore, passing no present interest. *Clement* v. *Yamgman*, 230

See EJECTMENT, 31, 35; FRAUD; SPECIFIC PERFORMANCE.

VERDICT.

1. *Duty of court to direct verdict for defendant.*—Where the plaintiff shows upon the trial no cause of action, or makes out no case whatever, and no motion for nonsuit is interposed, it is not only the right, but may be the duty of the court to direct a verdict for the defendant. This practice is common to both the code and the common law. *Murphy* v. *Cobb*, 330

See JURY.

WATER.

1. *Relation of water to mining.*—Review of the enlarged use of water by progress in the processes of mining for placer deposits, with the history of the recognition of its necessity, first by the action of the miners, then by the local courts and finally by congressional action. *Titcomb* v. *Kirk*, 10

2. *Underground currents not watercourses.*—Neither water flowing by percolation nor by undefined subterranean channels can be treated as a watercourse. *Haldeman* v. *Burckhart*, 108

3. *Water rights of miners.*—Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*. *Esmond* v. *Chew*, 175

4. *Reasonable use of stream, a question for jury.*—"The question of a reasonable use of the water by the mill owner above, depending, as it must, upon the size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case, must be determined by the jury and not by the court." *Pool* v. *Lewis*, 523

See DIP; DRAINAGE; INJUNCTION, 1; LICENSE, 2; PATENT, 1, 2; RIPARIAN RIGHTS.

WITNESS.

1. *Where one party is deceased the survivor can not testify.*—Parker leased oil territory to Tanner. Parker took possession, alleging abandonment and forfeiture by Tanner who afterward died, and his interest was sold by the sheriff. In ejectment by the vendee, *held*, that Parker was not a competent witness under the act of April 15, 1869, which was intended to exclude the testimony of the surviving party to a contract where the party opposed in interest has died, such being the intent of the act although Parker could not be described as coming within its literal terms. *Karns* v. *Tanner*, 289

2. *Idem.*—When a party to a thing or contract in action is dead and his rights have passed by his own act or law to another, who represents his interest, the surviving party shall not testify to matters occurring in the life of the adverse party. *Id.*

3. *Evidence by representative of deceased party.*—An objection to testimony of defendant concerning matters which occurred prior to the death of an individual, on the ground that the plaintiff is the representative of the deceased, will not be sustained unless it appears that the plaintiff is such representative within the meaning of § 393 of the California Practice Act. *Marquart* v. *Bradford*, 528

4. *Interested witnesses under chancery practice.*—Under the old chancery practice a complainant might obtain an order to examine a defendant, and a defendant a co-defendant, as a witness, upon an affidavit that he was a material witness and was not interested on the side of the appli-

WITNESS. *Continued.*

cant, in the matter as to which it was proper to examine him, but if so interested, his evidence could not be admitted. *Bragg* v. *Geddes*, 624

5. *Interested witnesses under statute.*—In a suit against the trustee of a legatee under a will, and the legatee and others, based upon a former partnership between the complainant and the testator and others in which there was a prayer for an accounting, etc., it was sought to introduce the testimony of the defendant copartners on behalf of the complainant as to facts which occurred before the death of the testator. *Held*, that under the statute relating to interested witnesses their testimony was incompetent. *Id.*

6. *Impeaching witness.*—A witness was asked certain questions relating to matters not involved in the suit, with a view to his impeachment. *Held*, that they were properly excluded. *Hinkle* v. *S. F. & N. P. R. R. Co.*, 645

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